TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 189

MILTON KNAPP, PETITIONER,

vs.

MITCHELL D. SCHWEITZER, JUDGE OF THE COURT OF GENERAL SESSIONS, AND FRANK S. HOGAN, DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED JUNE 13, 1957

CERTIORARI GRANTED OCTOBER 14, 1957

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MITCHELL D. SCHWEITZER, JUDGE OF THE COURT OF GENERAL SESSIONS, AND FRANK S. HOGAN, DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK.

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 12, 1957

[fol. 3] At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the Court House thereof, Foley Square, on the 3rd day of July, 1956.

Present: Hon. Jacob Markowitz, Justice.

Index No. 6755/1956

In the Matter

of

The Application of Milton Knapp, for an order under Article 78 of the Civil Practice Act, Petitioner,

against

Mitchell D. Schweitzer, Judge of the Court of General Sessions and Frank S. Hogan, District Attorney of the County of New York, Respondents.

Final Order Appealed From—July 3, 1956

A proceeding having been instituted by the petitioner in this Court under Article 78 of the Civil Practice Act to review a judgment of the Court of General Sessions of the County of New York (Schweitzer, J.) rendered on the 22nd day of May, 1956, adjudging the petitioner in contempt of court and sentencing him to thirty days imprisonment in the civil jail and to pay a fine of Two Hundred Fifty [fol. 4] ($250.00) Dollars, and to prohibit said Judge and the District Attorney of New York County from further proceeding in respect to the matters the subject of said contempt,

And a petition and reply having been submitted by the petitioner, and an answer and amended answer having been submitted by the respondents, and memoranda having been submitted by both parties, and an affidavit dated the 29th day of May, 1956, and a letter dated the 20th day of June, 1956, having been submitted by Assistant District Attorney Albert P. Loening, Jr., of counsel for the respondents, and

argument having been had by Messrs. William J. Keating and Bernard H. Fitzpatrick, of counsel for the petitioner, and by Assistant District Attorney Albert P. Loening, Jr., of counsel for the respondents, and due deliberation having been had thereon,

Now upon the petition, the answer, amended answer, and the reply herein, and the commitment of petitioner dated the 22nd day of May, 1956 and the minutes of the proceedings had in the said Court of General Sessions on the 25th and 30th days of April and on the 17th, 21st and 22nd days of May, 1956, it is

Ordered and Adjudged that the petition herein be, and the same hereby is, denied in all respects and dismissed, and it is further

Ordered and Adjudged that, upon the expiration of forty-eight (48) hours from the date of the service of this order entered and enrolled upon the attorneys for the petitioner, the stay heretofore ordered by this Court, by Mr. Justice Gavagan, on the 23rd day of May, 1956 be, and the same hereby is, vacated, and it is further

[fol. 5] Ordered and Adjudged that the Sheriff of the County of New York, at the expiration of said forty-eight hours, if no further stay is granted, may proceed to place the petitioner in custody pursuant to mandate heretofore issued by the Court of General Sessions of the County of New York.

Enter,

J. M.,
J.S.C.

IN SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK

[Title omitted]

ORDER TO SHOW CAUSE—May 22, 1956

Upon the petition of Milton Knapp verified the 22nd day of May, 1956, wherein it appears that he has been or may [fol. 6] be committed for a contempt of the Court of General Sessions of the Peace of the City and County of New York,

Let, the respondents show cause May 23, 1956, before Special Term, Part I of the Supreme Court to be held in and for the County of New York at the Court House thereof, Foley Square, at 10 a. m. in the forenoon, why the adjudication of contempt of the petitioner should not be reviewed and reversed; and why the respondent, Hon. Mitchell D. Schweitzer, should not be prohibited from proceeding further hereunder; and why the respondent, Frank S. Hogan, should not be prohibited from further inquiry as to the subject matter of said commitment; and why the petitioner should not have such other and further relief as may be just and proper in the premises; and

Sufficient cause appearing therefor, let service of a copy of this order and the petition herein be good and sufficient if made on or before the hour of 4 p. m., on the 22 day of May, 1956.

Dated, New York, N. Y., May 22, 1956.

s/ Irving L. Levey,
Justice of the Supreme Court.

[fol. 7] IN SUPREME COURT OF NEW YORK

[Title omitted]

PETITION—May 22, 1956

The petition of Milton Knapp for an order in the nature of a writ of prohibition and a review by certiorari under Article 78 of the Civil Practice Act, respectfully shows to the Court:

1. Petitioner is a co-partner of Eagle Reel Manufacturing Company whose offices and manufacturing plant are at 410 Longfellow Avenue, Bronx, N. Y.

2. Said Eagle Reel Manufacturing Company is engaged in commerce among and between several States.

3. The manufacturing operations of said Eagle Reel Manufacturing Company are organized by a labor organiza-

tion known as Local 239, International Brotherhood of Teamsters.

4. One Philip Greenberg is an official of said labor organization. There now and for some time previously have existed contractual relations between said Eagle Reel Manufacturing Company and said Local 239, I.B.T., in respect of the wages, hours and working conditions of the employees of said Eagle Reel Manufacturing Company.

5. In proceedings allegedly pending before the Third April Grand Jury of the County of New York, the announced purpose of which was to investigate violations of Sections 380 and 580 of the Penal Law of the State of New York, petitioner appeared as a witness.

[fol. 8] 6. Before said Grand Jury, petitioner was asked in particular a series of questions designed to elicit information as to payment of moneys between petitioner as a co-partner in said Eagle Reel Manufacturing Company and said Greenberg.

7. Petitioner before said Grand Jury declined to answer said questions asserting his privilege against self incrimination.

8. Thereafter the said Third April Grand Jury conferred immunity on the petitioner pursuant to Section 2447 of the Penal Law and the witness was again questioned in identical language and again asserted his privilege against self-incrimination.

9. Thereafter upon summary application of Frank S. Hogan, District Attorney, County of New York, by counsel, Harold Birns, respondent, Mitchell D. Schweitzer, Judge of the Court of General Sessions, directed petitioner to answer the questions aforesaid over petitioner's objections as follows:

> (a) That the Court of General Sessions of the Peace of the City and County of New York had no jurisdiction of any offense involving the payment of money to a labor organization or its agents by an employer whose employees are engaged in interstate commerce by virtue of the Labor Management Relations Act of 1947 (Taft-Hartley Act, Sections 7 and 302);

(b) That it was not shown that there was any investigation validly pending before said Third April Grand Jury;

[fol. 9] (c) That the grant of immunity pursuant to Section 2447 of the Penal Law is insufficiently broad in that it does not bar prosecution of the petitioner for violation of Section 302 of the Labor Management Relations Act of 1947; and

(d) That the books and records of petitioner's firm which constituted the foundation of the questions asked of petitioner were obtained by unlawful process; specifically in that by the trick or device of a subpoena returnable before the Grand Jury, petitioner was induced without advice of counsel to deliver said books to the said District Attorney.

10. Thereafter petitioner respectfully declined to answer said questions. Whereupon, the said District Attorney moved upon oral application in open court without citation or affidavit to punish petitioner for a contempt of Court.

11. Thereafter, respondent, Hon. Mitchell D. Schweitzer, Judge, upon said summary application found petitioner guilty of a contempt committed in the immediate view and presence of the Court and has ordered him to be committed therefor, and he now is in custody.

12. No previous application for the relief herein requested has been made before any Court or Judge.

Wherefore, your petitioner respectfully prays that an order be made and entered and engrossed herein:

[fol. 10] 1. Prohibiting the respondent, Hon. Mitchell D. Schweitzer, from proceeding further to punish petitioner for contempt;

2. Prohibiting the respondent, Frank S. Hogan, from further proceeding to elicit any testimony from your petitioner in respect of the matters set out herein;

3. Setting aside the adjudication of contempt entered in said Court of General Sessions and dismissing the application to punish petitioner for contempt of said Court;

4. Reviewing and reversing the adjudication aforesaid; and

5. Granting the petitioner such other and further relief as may be just and proper in the premises.

Dated, New York, N. Y., May 22, 1956.

Milton Knapp, Petitioner.
William J. Keating and Butler, Bennett & Fitzpatrick, Attorneys for Petitioner, Office & P. O. Ad-ress, 60 Wall Street, New York 5, N. Y.

[fol. 11] *Duly sworn to by Milton Knapp, jurat omitted in printing.*

IN SUPREME COURT OF NEW YORK

[Title omitted]

ANSWER

To the Supreme Court of the State of New York,
County of New York:

Mitchell D. Schweitzer and Frank S. Hogan, Respondents, individually and as Judge of the Court of General Sessions of the County of New York, and District Attorney of the County of New York, respectively, for answer to the above-captioned petition of Milton Knapp, admit each of [fol. 12] the allegations contained therein except as hereinafter indicated:

1. As to the allegations contained in Paragraphs 1-4, the Respondents have no knowledge or information sufficient to form a belief as to the truth thereof, but do not dispute the allegations therein set forth;

2. As to the allegations contained in Paragraph 9, the Respondents admit that the Petitioner was directed to answer over his objections, as stated in the aforesaid Paragraph 9, without admitting the validity of any of the said objections.

Wherefore, the Respondents herein respectfully pray that the relief sought by the petitioner herein be denied and the petition be dismissed with costs.

Mitchell D. Schweitzer, Judge, Court of General Sessions, County of New York, Respondent.
Frank S. Hogan, District Attorney of the County of New York, Respondent.

Dated, May , 1956, New York, New York.

(Verified by Mitchell D. Schweitzer and Frank S. Hogan, May 23, 1956.)

[fol. 13] In Supreme Court of New York

[Title omitted]

Amended Answer—May 29, 1956

To the Supreme Court of the State of New York,
County of New York:

Mitchell D. Schweitzer and Frank S. Hogan, Respondents, individually and as Judge of the Court of General Sessions of the County of New York, and District Attorney of the County of New York, respectively, for answer to the above-captioned petition of Milton Knapp, admit each of the allegations contained therein except as hereinafter indicated:

1. As to the allegations contained in Paragraphs 1-4, the Respondents have no knowledge or information sufficient to form a belief as to the truth thereof, but do not dispute the allegations therein set forth;

2. As to the allegations contained in Paragraph 9, the Respondents admit that the Petitioner was directed to answer over his objections, but deny the validity of any of said objections.

The Respondents, Mitchell D. Schweitzer and Frank S. Hogan, hereby object to the sufficiency of the petition herein upon the ground that the said petition does not state facts sufficient to entitle petitioner to the relief sought.

[fol. 14] Wherefore, the Respondents herein respectfully pray that the relief sought by the petitioner herein be denied and the petition be dismissed with costs.

Mitchell D. Schweitzer, Judge, Court of General Sessions, County of New York, Respondent.
Frank S. Hogan, District Attorney of the County of New York, Respondent.

Dated, May 29, 1956, New York, New York.

Frank S. Hogan, District Attorney, New York County, Attorney for Respondents, Office and P. O. Address, 155 Leonard Street, New York, New York.

(Verified May 29, 1956, by both Respondents.)

[fol. 15] In Supreme Court of New York

[Title omitted]

Reply

Now Comes the petitioner, Milton Knapp, and replies to the amended answer as follows:

I.

Respecting the respondents' denial of paragraph 9(b) of the petition in so far as the same may create an issue of fact, petitioner alleges:

1. That all the questions asked of him related to acts, transactions or events occurring in the County of Bronx and not within the County of New York.

2. That no minute of the said Third April Grand Jury was offered in evidence or disclosed to petitioner or his counsel showing that any process had been authorized by said Grand Jury or that any witness had testified before said body in respect of the alleged subject matter, nor that any arrest of any individual had been made, nor that any proceedings in a Magistrate's Court had been had resulting in a reference to said Grand Jury, nor that any complaint had been filed with said body.

3. That no part of the alleged proceedings before the Grand Jury was proven or offered to be proven save those proceedings concerning the petitioner alone.

[fol. 16] II.

That in substantiation of the reality of petitioner's danger of self incrimination under the provisions of Section 302 of the Labor Management Relations Act, 1947, petitioner further alleges:

1. That the United States Attorney for the Southern District of New York is Paul B. Williams.

2. That said Paul B. Williams has made public announcement of his intention to cooperate with the District Attorney of New York County in the prosecution of criminal cases in the field of the subject matter out of which petitioner's commitment arose.

3. Upon information and belief, the respondent District Attorney of New York County intends to cooperate with said Williams in the prosecution of such criminal cases in the Courts of the United States.

Wherefore, petitioner respectfully prays that the order prayed for in the petition issue.

Bernard H. Fitzpatrick, A Member of the Firm.
William J. Keating, Butler, Bennett & Fitzpatrick,
Attorneys for Petitioner, Office & P. O. Address,
60 Wall Street, New York 5, N. Y.

[fol. 17] *Duly sworn to by Bernard H. Fitzpatrick, jurat omitted in printing.*

[fol. 18] IN SUPREME COURT OF NEW YORK

[Title omitted]

AFFIDAVIT OF ALBERT P. LOENING, JR.—May 29, 1956

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

ALBERT P. LOENING, JR., being duly sworn, deposes and says:

I am an Assistant District Attorney employed in the office of the District Attorney of New York County, the Honorable Frank S. Hogan, who represents the respondents, and am familiar with the proceedings heretofore had herein.

This affidavit is submitted in support of respondents' answer and amended answer, heretofore submitted to this honorable Court.

There will also be submitted herewith the originals of the mandate of commitment and of the stenographic transcript of the proceedings herein before the respondent, Hon. Mitchell D. Schweitzer, Judge of the Court of General Sessions, New York County, which are on file with the Clerk of said Court; and, also, the opinion rendered in the instant matter by said Judge, which sets forth the facts in detail.

The aforesaid opinion fully answers the contentions raised by petitioner in subparagraphs (a) and (c) of paragraph 9 of the petition, and is incorporated herein by reference.

The contentions raised in subparagraphs (b) and (d) of said paragraph 9 are not discussed in the aforesaid opinion for the reason that they were not relied upon in the Court below (see transcript of testimony, hearing of May 21, 1956, p. 3). It appears that both these contentions are merely afterthoughts.

[fol. 19] At no time in the proceeding below did petitioner introduce any evidence to substantiate his bare assertion in subparagraph (b) that no investigation was validly pending before the Third April Grand Jury. In the absence of such evidence, the proceedings before the Grand Jury must be presumed to be regular in all respects. Nevertheless, respondents stand ready, if need be, to refute by competent evidence this assertion of petitioner.

The contention raised in subparagraph (d), that petitioner's books were obtained by unlawful process, can only be described as frivolous. The record below indicates clearly that these books and records were obtained in a lawful and proper manner. Furthermore, petitioner's contention is irrelevant. His contempt consisted merely in failure to answer certain questions. Whether these questions were

derived from an examination of his books and records, or from some other independent source of information, can be of no importance.

For the foregoing reasons, your deponent respectfully submits that, since no valid reason has been advanced why petitioner should not be adjudged in contempt of court, the application of petitioner must, in all respects, be denied.

/s/ Albert P. Loening, Jr.

(Sworn to before Rubin G. Semendoff, May 29, 1956.)

[fol. 20] At a Term of the Court of General Sessions, held in and for the County of New York, Part I thereof, April, 1956 Term, at the Criminal Courts Building, 100 Centre Street, Borough of Manhattan, City and County of New York, on the 22nd day of May, 1956.

Present: Hon. Mitchell D. Schweitzer, Judge.

Order Adjudging Witness Guilty of Contempt.

The People of the State of New York,

against

Milton Knapp, a witness before the Third April, 1956 Grand Jury of the County of New York.

Mandate of Commitment of the Court of General Sessions—May 22, 1956

The Grand Jury heretofore in due form of law selected, drawn, summoned and sworn to serve as Grand Jurors in the Court of General Sessions of the County of New York, and now actually acting as the Grand Jury in and for the body of the said County of New York, come into court and make complaint by and through their foreman, theretofore duly appointed and sworn, and it appearing to the satisfaction of the Court that Milton Knapp, on April 23, 1956, and April 25, 1956, after being duly summoned and sworn

[fol. 21] in the manner prescribed by law as a witness in a certain matter and complaint, pending before such Grand Jury whereof they had cognizance, against John Doe et al., for the crimes of conspiracy, bribery of labor representatives and extortion, did then and there refuse to answer legal, proper and relevant questions which were propounded to him, and the said Milton Knapp, instead of answering the said questions did refuse to answer the same and gave no lawful reason therefor.

The following are the questions which the witness contumaciously and unlawfully refused to answer:

1. Q. Now, who represented the union in these negotiations leading to a salary increase?

2. Q. Mr. Knapp, do you know a man named Phillip Goldberg?

3. Q. Mr. Knapp, do you know whether Phillip Goldberg is an official of Local #239, International Brotherhood of Teamsters?

4. Q. Mr. Knapp, on or about October 28th, 1955, did you give Phillip Goldberg, a representative of Local #239, International Brotherhood of Teamsters, the sum of $500?

5. Q. Mr. Knapp, I show you this check, marked Grand Jury Exhibit One of today's date, in the sum of $500 and ask whether you recognize it?

6. Q. Mr. Knapp, on or about October 28th, 1955, did you go to the Public National Bank and Trust Company at 149th Street and Prospect Avenue and cash this check, Grand Jury Exhibit Number One, and receive from the [fol. 22] bank the sum of $500?

7. Q. Mr. Knapp, on October 28th, 1955, were you accompanied by Phillip Goldberg, an official of Local #239, International Brotherhood of Teamsters, when you went to the Public National Bank and Trust Company, located at 149th Street and Prospect Avenue?

8. Q. Mr. Knapp, I again show you Grand Jury Exhibit One of today's date and ask whether your handwriting appears upon the face of that check?

9. Q. Mr. Knapp, I show you a stub book, that appears to be a check stub book, and I ask you to examine this check stub book and tell me whether your handwriting appears on the space assigned to number 2908, that is the box?

10. Q. Mr. Knapp, I direct your attention to the box, number 2908 and I ask you to tell the grand jury what initial appears before the name, Goldberg?

11. Q. Mr. Knapp, I ask whether Grand Jury Exhibit Two of today's date is in fact a stub book used by the Eagle Reel and Manufacturing Company?

12. Q. Mr. Knapp, when was the last time you spoke to Phillip Goldberg?

13. Q. Do you know a man named Sam Goldstein?

14. Q. Isn't it a fact that Sam Goldstein is an official of Local #239, International Brotherhood of Teamsters?

[fol. 23] 15. Q. Did you ever pay or give any sum of money to Samuel Goldstein?

And the Court, on April 25, 1956, after taking testimony and hearing argument by counsel for the said Milton Knapp and the District Attorney, having then and there decided that the said questions were legal, proper and relevant, and no lawful reason being given by the said Milton Knapp for not answering the said questions, did order the said Milton Knapp to return to the grand jury and to answer the said questions, and the said Milton Knapp did reappear before the said grand jury on April 27, 1956, whereupon each of the aforesaid questions was again read to him and the said Milton Knapp persisted in his refusal to answer each of those questions;

And the said Milton Knapp again appeared before the Court in answer to an application made by the foreman of the said grand jury and the District Attorney for an order adjudging the said Milton Knapp in contempt of court, pursuant to sections 750 and 751 of the Judiciary Law;

And after a further hearing on April 27, 1956, at which testimony was received by the Court and argument sub-

mitted by counsel for the said Milton Knapp and by the District Attorney;

And after receiving briefs on May 12, 1956, from counsel for the said Milton Knapp and from the District Attorney;

And after further hearings on May 17, 1956, and May 21, 1956, and May 22, 1956, and the said Milton Knapp still contumaciously and unlawfully refusing to answer the [fol. 24] said questions; it is therefore summarily

Ordered and Adjudged that the said Milton Knapp is guilty of criminal contempt of court in having committed the act above set forth, and it is

Ordered and Adjudged that the said criminal contempt of court the said Milton Knapp be committed to the Civil Jail of the County of New York, for the term of 30 days, and that he pay a fine of $250.00 and in default of the payment of the said fine that he be imprisoned in the said Jail of the County of New York until the said fine be paid, not exceeding thirty days, to be computed from the expiration of the definite time above mentioned.

/s/ Mitchell D. Schweitzer

[fol. 25] IN COURT OF GENERAL SESSIONS,

COUNTY OF NEW YORK—PART I

In the Matter of

The Application by the District Attorney for Instructions from the Court to a Witness Appearing Before the Third April, 1956, Grand Jury.

Witness: MILTON KNAPP.

Before: Hon. Mitchell D. Schweitzer, J.

Hearing—April 25, 1956

APPEARANCES:

For the People: Harold Birns, Esq., Assistant District Attorney.

For Witness: William J. Keating, Esq.

PRESENT:

Mr. George M. Tisdale, Foreman of the Third April, 1956, Grand Jury.

Mr. Joel Kahn, Stenographer of the Third April, 1956, Grand Jury.

Mr. Milton Knapp—Witness.

[fol. 26] The Clerk: Application by the District Attorney for a direction by the Court to witness Milton Knapp appearing before the Third Grand Jury, April, 1956, Term, to answer certain questions put to him.

The witness is represented by Mr. William J. Keating.

The Court: Note your appearance, Mr. Keating, please.

Mr. Keating: I have.

COLLOQUY

The Court: Is the Stenographer from the Grand Jury present?

The Clerk: Yes.

The Court: Is the Foreman present?

The Foreman: Yes.

The Court: Proceed.

Mr. Birns: If your Honor pleases, the people are applying for a direction to the witness Milton Knapp to answer proper interrogatories put to him before the Grand Jury.

Your Honor, there is now pending before the Grand Jury a proceeding in respect to People v. John Doe, et al., which proceeding is initiated to determine whether or not the crimes of conspiracy and bribery of labor officials, and the crime of extortion have been committed in the County of New York.

This proceeding, your Honor, is part of a continuing investigation by the District Attorney's office to ferret out all instances of organized racketeering in connection with labor unions.

In connection with this proceeding, your Honor, Mr. Milton Knapp was brought before the Grand Jury as a witness. I may state, your Honor, that other witnesses have testified before this Grand Jury. Mr. Knapp first ap- [fol. 27] peared before the Grand Jury on Monday of this week, April 23rd, and at that time certain questions were put to him, and I do have before me now the transcript of the questions asked of him at that time, and his answers.

He appeared before the Grand Jury again today, your Honor, and in answer to some of my questions—I may say to all of my questions he declined to answer, stating his privilege against incrimination.

The Foreman was then requested by me to direct the witness to answer and he maintained his refusal again on similar grounds.

The Court: Was there any vote taken with respect to the granting of immunity to the witness?

Mr. Birns: The Grand Jury voted to give immunity to this witness in conformity with Section 2447 of the Penal Law.

Now, your Honor, the People request that your Honor direct the witness to answer the questions put to him before the Grand Jury.

The Court: Is the Stenographer here?

Mr. Kahn: Yes, your Honor.

The Court: Please read into the record the pertinent portions of the witness' testimony.

Mr. Birns: Your Honor, to keep the record clear, may I hand up to the Court now and direct the Court's attention to that portion of the Grand Jury testimony which commences on page 15 of the Grand Jury minutes. Your Honor may read those, and then may we continue so as to keep the sequence of events?

May the record indicate I am handing up the record to your Honor?

The Court: You may continue. Do you want this witness sworn? Swear him.

[fol. 28] Mr. Keating: Was that question directed to me?

The Court: It does not make any difference.

JOEL KAHN, residing at 1 East 198th Street, The Bronx, New York, called as a witness in behalf of the People, being first duly sworn, testified as follows:

The Court: You are the Official Stenographer for the Third April 1956 Grand Jury?

The Witness: Yes, your Honor.

The Court: Now, these minutes have been furnished to me. Did you transcribe them?

Mr. Birns: Your Honor, these minutes were taken by a different stenographer, George Felixbrod.

The Court: Did this stenographer continue from that point on?

Mr. Birns: Yes, he took over today.

The Court: Indicate where the start is for the purpose of your application.

Mr. Birns: We can start at the beginning of the questioning, your Honor, and take it right through. I think every question is relevant, and will be so held by your Honor.

The Court: All right.

The Witness: (Reading from his notes:)

"Mr. Birns: Mr. Foreman, this witness has previously been sworn. Will you be seated, please?

[fol. 29] "The Foreman: You understand that you are still under oath, Mr. Knapp?

"A. That's right.

"By Mr. Birns:

"Q. Mr. Knapp, do you know a man by the name of Philip Goldberg?

"A. On the advice of my lawyer I respectfully refuse to answer the question on the grounds that to do so might tend to incriminate me.

"Mr. Birns: Mr. Foreman, I respectfully request that you direct the witness to answer the question.

"The Foreman: Mr. Knapp, you were told the other day that this jury had voted to grant you immunity. Now, again on behalf of this jury I direct you to answer that question. You are not on trial.

"A. I still have to give you the same answer, sir.

"By Mr. Birns:

"Q. You understand, Mr. Knapp, that your answer is, then, that you refuse to comply with the direction of the Foreman?

"A. That's right.

"Q. You understand, do you not, Mr. Knapp, that you have been given immunity by this Grand Jury. You have been given immunity for any and all crimes disclosed by your testimony. Do you understand that?

"A. My lawyer has advised me what to do.

"Q. I appreciate that, but do you understand that you are given immunity by this Grand Jury?

"A. He probably understands it. I am not a lawyer. [fol. 30] "Q. You have discussed this question with your lawyer?

"A. Yes, sir.

"Q. Do you understand further, Mr. Knapp, that your failure to comply with the direction of the Foreman to answer any question may subject you to prosecution for criminal contempt of court? Do you understand that?

"A. Can I speak to my attorney?

"Q. To determine whether you may be subject to criminal prosecution, for criminal contempt of court, is that what you want to speak to him about?

"A. I just like to speak to him.

"Q. You may step outside.

"A. Thank you.

"(Witness excused).

"Q. Mr. Knapp, you have returned to the jury room. You have spoken with your attorney?

"A. That's right.

"Q. Now, my question to you is whether you are aware that a failure to comply with the direction of the Foreman that you answer my question may subject you to a prosecution for criminal contempt of court?

"A. He advised me to take the same advice, sir.

"Q. And you refuse to comply with the direction of the Foreman?

"A. That's right.

"Q. Mr. Knapp, do you know Phillip Goldberg, an official of Local 239, International Brotherhood of Teamsters?

"A. On the advice of my lawyer, I respectfully refuse to answer the question on the grounds that to do so might tend to incriminate me.

[fol. 31] "Mr. Birns: Mr. Foreman, I respectfully request that you direct the witness to answer.

"The Foreman: Mr. Knapp, on behalf of this Grand Jury I request you to answer that question.

"A. On the advice of my lawyer, I respectfully refuse to answer on the ground to do so might tend to incriminate me.

"Mr. Birns: Mark this, please.

"Grand Jury Exhibit 1 of today's date marked in evidence.

"Q. Mr. Knapp, on or about October 28, 1955, did you give Phillip Goldberg, a representative of Local 239, International Brotherhood of Teamsters, the sum of $500?

"A. On the advice of my counsel, I respectfully refuse to answer on the grounds that to do so might tend to incriminate me.

"Mr. Birns: Mr. Foreman, I respectfully request that you direct the witness to answer the question.

"The Foreman: I request that you answer that question.

"A. On the advice of my lawyer I refuse to answer on the grounds that it may tend to incriminate me.

"Q. Mr. Knapp, I show you this check marked Grand

Jury Exhibit No. 1 of today's date in the sum of $500 and ask whether you recognize it.

"A. On the advice of my lawyer, I respectfully refuse to answer on the grounds that to do so might tend to incriminate me.

"Mr. Birns: Mr. Foreman, I respectfully request that you direct the witness to answer the question.

"The Foreman: Mr. Knapp, I direct you to answer the question the District Attorney put to you.

[fol. 32] "A. On the advice of my lawyer I refuse to answer on the grounds that to do so might tend to incriminate me.

"Q. Mr. Knapp, on or about October 28, 1955, did you go to the Public National Bank & Trust Company at 149th Street and Prospect Avenue and cash this check, Grand Jury Exhibit Number 1, and receive from the bank the sum of $500?

"A. On the advice of my lawyer, I respectfully refuse to answer on the grounds that to do so might tend to incriminate me.

"Mr. Birns: Mr. Foreman, I again respectfully request that you direct the witness to answer the question.

"The Foreman: Mr. Knapp, I direct you to answer that last question of the District Attorney.

"A. On the advice of my lawyer, I respectfully refuse to answer on the grounds that to do so might tend to incriminate me.

"Q. On October 28, 1955, were you accompanied by Phillip Goldberg, an officer of Local 239, International Brotherhood of Teamsters, when you went to the Public National Bank & Trust Company, located at 149th Street and Prospect Avenue?

"A. On the advice of my lawyer I respectfully refuse to answer on the grounds that to do so might tend to incriminate me.

"Q. Mr. Knapp, I again show you Grand Jury Exhibit Number 1 of today's date and ask you whether your handwriting appears upon the face of that check.

"A. On the advice of my lawyer I respectfully refuse to

answer on the grounds that to do so might tend to incriminate me.

"Mr. Birns: Mr. Foreman, again I respectfully request that you direct the witness to answer my question.
[fol. 33] "The Foreman: Mr. Knapp, I again ask you to answer the question put to you before this Grand Jury.

"A. On the advice of my lawyer, I respectfully refuse to answer on the grounds that to do so might tend to incriminate me.

"Q. Mr. Knapp, I show you a stub book that appears to be a checkstub book and I ask you to examine this checkstub book and tell me whether your handwriting appears on the space showing the number 2908. That is the box.

"A. On the advice of my lawyer, I respectfully refuse to answer on the grounds that to do so might tend to incriminate me.

"Mr. Birns: Mr. Foreman, I respectfully request that you direct the witness to answer the question.

"The Foreman: Mr. Knapp, I again direct you to answer on behalf of this Grand Jury.

"A. On the advice of my lawyer, I respectfully refuse to answer on the grounds that to do so might tend to incriminate me.

"Q. Mr. Knapp, I direct your attention to the box number 2908 and I ask you to tell the Grand Jury what initial appears before the name Goldberg.

"A. On the advice of my lawyer, I refuse to answer on the ground that to do so might tend to incriminate me.

"Mr. Knapp: Incidentally, Mr. Stenographer, may I mark this stub book Grand Jury Exhibit Number 2 of today's date?

"So marked.

"Q. Mr. Knapp, I show you Grand Jury Exhibit Number 2 of today's date. Is it, in fact, a stub book used by the Eagle
[fol. 34] Reel & Manufacturing Company?

"A. I refuse to answer on the ground that my answer might tend to incriminate me.

"Mr. Birns: Mr. Foreman, I respectfully request that you direct the witness to answer.

"The Foreman: Mr. Knapp, I again direct you to answer that last question of the District Attorney.

"A. On the advice of my lawyer, I respectfully refuse to answer on the grounds that to do so might tend to incriminate me.

"Q. Mr. Knapp, when was the last time you spoke to Phillip Goldberg?

"A. On the advice of my lawyer I respectfully refuse to answer on the grounds that to do so might tend to incriminate me.

"Mr. Birns: Mr. Foreman, I respectfully request that you direct the witness to answer the question.

"The Foreman: Mr. Knapp, on behalf of this Grand Jury, I direct you to answer that question put to you by the District Attorney.

"A. On the advice of my lawyer, I respectfully refuse to answer on the grounds that to do so might tend to incriminate me.

"Q. Do you know a man named Sam Goldstein?

"A. On the advice of my lawyer, I refuse to answer on the grounds that to do so might tend to incriminate me.

"Mr. Birns: Mr. Foreman, I respectfully request that you direct the witness to answer the question.

"The Foreman: Mr. Knapp, on behalf of this Grand Jury, I direct you to answer the question of the District Attorney.

"A. I refuse to answer on the grounds that my answer might tend to incriminate me.

[fol. 35] "Q. Isn't it a fact that Mr. Goldstein is an official of 239, International Brotherhood of Teamsters?

"A. On the advice of my lawyer I respectfully refuse to answer on the grounds that to do so might tend to incriminate me.

"Q. Did you ever pay or give any sums of money to Samuel Goldstein?

"A. On the advice of my lawyer, I respectfully refuse to

answer on the grounds that to do so might tend to incriminate me.

"Mr. Birns: Mr. Foreman, again I respectfully request that you direct the witness to answer my question.

"The Foreman: Mr. Knapp, on behalf of this Grand Jury, I direct you to answer the question of the District Attorney.

"A. On the advice of my lawyer, I respectfully refuse to do so on the grounds that it might tend to incriminate me.

"Q. Do you understand, Mr. Knapp, that with respect to any answers that you may have given this Grand Jury to any questions asked by me today, that you in fact will be receiving immunity from this Grand Jury for any crimes disclosed by your testimony? Do you understand that?

"A. On the advice of my lawyer, I respectfully refuse to answer any question that might tend to incriminate me.

"Mr. Birns: Mr. Foreman, will you direct the witness please to appear forthwith in Part I in the Court of General Sessions to make application to the Judge presiding there for a direction that the witness answer questions before the Grand Jury?

[fol. 36] "The Foreman: Mr. Knapp, you will appear immediately in Part I of this court before Judge Schweitzer, so that the questions put to you by the District Attorney may be referred to him for action?

"Mr. Birns: You may step down.

"Witness excused."

The Court: Continue, sir.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Birns: Your Honor, the People now submit that the questions are proper interrogatories asked of this witness, and respectfully request that your Honor direct the witness to answer the questions which have been put to him, as reflected by a reading of the stenographer's transcript and the transcript which I handed up to the bench earlier.

The Court: I will hear you, sir.

Mr. Keating: Your Honor, since this proceeding raises constitutional questions, and raises the question of the power and the authority of the Grand Jury under the Con-

stitution, the rights and powers and the authority of the District Attorney's office under the State Constitution, and raises certain questions with respect to the abuse of the process of the Grand Jury by the District Attorney's office, I respectfully submit that questions——

The Court: I am awfully sorry to interrupt, Mr. Keating. I want to see if I understand you correctly. Is it your contention that upon the present state of the record there are constitutional questions raised which involve an abuse by the District Attorney's office of process?

Mr. Keating: Not on the state of the record as you know it here this afternoon.

[fol. 37] The Court: That is all I know, what is in the record, sir. Is there anything you want to add to the record?

Mr. Keating: I was prefacing a submission by me, your Honor, as to the reason why I felt constrained to make a record in this case at this time.

Now, on Monday, April 23rd of this week, before Milton Knapp was summoned into the Grand Jury, I handed the Warden of the Grand Jury a communication signed by me addressed to the Foreman of the Grand Jury. My reading of this communication at this time will serve two purposes: One, it is a recital of the facts in this case as I know them to date; number two, it is a communication to the Foreman of the Grand Jury.

Mr. Birns: I would like to interrupt, your Honor, to state that such a communication was received by the Foreman. It is now part of the records of the Grand Jury.

The Court: Has it been so marked, sir?

Mr. Birns: Yes, sir.

The Court: Produce it, please, and may I see it?

Mr. Birns: Yes, your Honor.

The Court: And Mr. Keating, for the record do you desire that this communication be made part of my record?

Mr. Keating: Yes, your Honor. I would like to have permission to read it because it is a recital of the facts.

The Court: I think the interests of justice would be better served if we deemed this communication, already marked as a Grand Jury exhibit, in evidence before me without your reading it. I will read it.

[fol. 38] Mr. Birns: For the information of the Court, your Honor, may I also state that the communication was

marked in the Grand Jury and I read it into the record before the Grand Jury, and it now constitutes part of the Grand Jury minutes.

The Court: It will be deemed marked as an exhibit on this hearing, sir, and I will read it.

(Letter of Mr. Keating to the Grand Jury deemed marked Court's Exhibit 1.)

Mr. Keating: Does your Honor bar me from reading it? It constitutes a recital of the facts in this case to date.

Mr. Birns: I don't think, your Honor, counsel has any right to read the Grand Jury minutes in public fashion.

The Court: That was my purpose, Mr. Keating.

Mr. Keating: It is my copy of the letter. This is my letter to the Grand Jury.

The Court: Sir, if you are satisfied that your letter was received in evidence by the Grand Jury and marked, and now is made part of this record, sir, wouldn't it be better that no public disclosure of the contents of this letter be made at this time? I will read it, sir, and if it is relevant I will consider it in connection with any application made by the District Attorney.

Mr. Keating: I disagree with your Honor. I think I have just as much a right to make a public record in this court as the District Attorney did in reading from the Grand Jury minutes.

The Court: Even if it involves a communication sent to the Grand Jury?

Mr. Keating: This is not a confidential communication. [fol. 39] The Court: Do you have any objection to reading it into the record?

Mr. Birns: I may state to your Honor that the only question before the Court is whether the questions put to this witness were relevant. The People have asked the Court for a direction that the witness answer the questions. That is the only issue before your Honor at the present time.

Mr. Keating: Because I haven't been given an opportunity to speak, your Honor, of course, that is the only issue so far.

The Court: Mr. Keating, in my court everyone has a chance to speak.

Mr. Keating: I know that, your Honor. My remark was not addressed to you, your Honor.

The Court: Provided they speak on the issue. I do not permit speeches on collateral evidence, and if this is relevant, sir, you may talk as long as you want, if it is on the issues, sir. The only issue we have is a very simple one: First, were the questions proper? Second, did the Grand Jury in fact vote immunity to the witness?

Mr. Keating: My letter will raise many other things: The question of whether or not certain documents before the Grand Jury, identified as People's exhibits in the minutes just read, are legally before the Grand Jury at this time.

The Court: Are you referring to the stubs and the check?

Mr. Keating: Yes.

The Court: May I ask you, Mr. Birns, the manner in which these documents were produced?

Mr. Birns: Yes, your Honor, you may.

The Court: Is there a question raised as to that, sir?

[fol. 40] Mr. Keating: I would prefer, your Honor, to follow the usual procedure in being given the opportunity to make a statement in answer to the statement made by the District Attorney.

The Court: You may continue, sir. You tell me how the documents got into the Grand Jury room.

Mr. Keating: I am the attorney for Milton Knapp, a partner in the Eagle Reel and Manufacturing Company, located at 410 Longfellow Avenue, in the Bronx. Mr. Knapp is neither a complainant in any criminal case, nor is he charged with a crime.

On Tuesday, April 3, 1956, he received at his place of business a subpoena duces tecum commanding him to produce certain books and records of the firm before a New York County Grand Jury at 155 Leonard Street, New York City, on the following day at 2:30 P. M.

Mr. Birns: May I take the opportunity to interrupt, your Honor? Your Honor, I don't like to do this, and I wouldn't ordinarily get up, counsel, but I would like your Honor to look at the letter before you and see if it is not a fact that in effect counsel is reading from his copy of the letter.

Mr. Keating: I am reading only the portions of this letter that involve a recital of the facts in this case.

Mr. Birns: An indirect way of bringing the minutes of the Grand Jury before——

The Court: Mr. Keating, may I respectfully ask this question——

Mr. Keating: You mean this letter is not my property, your Honor? Is that the ruling in this case, that a copy of this letter is not my property to do with as I wish, just [fol. 41] because I gave the original to the Foreman of the Grand Jury? The Grand Jury may be under a restriction not to release it to anybody else.

The Court: I am asking you, sir, to confine your statement or your remarks to pertinent——

Mr. Keating: That is what I want to do.

The Court: We know what the issue is now. I want to know whether or not these questions were proper.

Mr. Keating: I am going right to the nub of the issue, the manner in which this man was brought before the Grand Jury.

The Court: You may continue.

Mr. Keating: Mr. Knapp appeared promptly with the subpoenaed books and records and inquired for the location of the Grand Jury. He was directed, in the lobby of the District Attorney's office, to the ninth floor of the building, where he surrendered the subpoena, and instead of going before the Grand Jury was shunted by a representative of the District Attorney's office to a room on the eighth floor, where he was introduced to a Mr. Lacter, an accountant employed by the District Attorney. Mr. Lacter took Mr. Knapp to a room on the seventh floor, where they were met by Mr. Birns, an Assistant District Attorney. Mr. Knapp was asked to leave the room while Mr. Lacter and Mr. Birns examined his books.

Later Mr. Knapp was questioned by Mr. Birns, who demanded to know whether a certain official of Local 239, International Brotherhood of Teamsters, had extorted money from Mr. Knapp's firm in connection with a labor contract covering the firm's ten employees.

After Mr. Birns spoke menacingly about taking Mr. Knapp before the Grand Jury, Mr. Lacter, the accountant,

[fol. 42] gave Mr. Knapp a receipt for certain records which were retained by Mr. Lacter.

Mr. Knapp was not represented by counsel during any of the foregoing. He did not know that his books and records were unlawfully obtained and withheld by an improper use of the Grand Jury process.

I therefore respectfully submit that in view of the fact that the investigation—I will come to the nature of the investigation because that touches upon the remarks made by the Assistant District Attorney here in this proceeding; I will come to that later—because of the nature of the investigation and the reputation of the persons involved in this investigation, and so that I may properly advise my client in this matter, I addressed these questions to the Grand Jury.

Now, I am confining myself at this stage of the proceeding, your Honor, to the first of the two questions listed in the letter. I think the second one is not material at this particular state of the proceedings. The question was: Does this Grand Jury condone or condemn an abuse of process which in this case has resulted in an unlawful search and seizure? These questions to the Grand Jury are asked in behalf of the small business man, who has been led to believe, by what has appeared in the press, that this investigation is being made in good faith. He sincerely hopes so. But before I can permit him to place his business, his life and his honor in jeopardy, I must know the answers to these questions. And if I may quote, "Reformers often have a cause which makes a short cut seem justified. But one of the main objects of our Constitution is to see that short cuts are not taken. Experience showed [fol. 43] that once one man's rights can be tampered with, all men's rights are in jeopardy." I quote from "An Almanac of Liberty" by Mr. Justice William O. Douglas.

Now, the nub of this case, your Honor, what we have here, stripped of all legal verbiage, is a businessman who was caught in the middle. The District Attorney's office announced more than a month ago, and the announcement was widely heralded in the press, radio and television, that a drive was on to ferret out racketeering in labor unions, and I would like to come back later and go into some of

the facts of that publicity because it has a bearing on the statement I made with respect to the nature of the investigation and the character and the reputations of the persons involved, because these have a direct bearing on the honesty, the attitude, the mental processes, the motivation behind this action taken by this businessman on my advice. I would like to come back to that if I may when I have had opportunity to make a full record in this case.

On the question of the legality of the procedure by which this man's records were brought into the District Attorney's office, I know that under the law of the State of New York evidence illegally obtained by means of an unlawful search and seizure is admissible (sic).

The Court: I want to confess at this point, Mr. Keating, I cannot see the basis for even a discussion of the illegal search and seizure of books that are voluntarily brought down to the District Attorney's office, purportedly for production before a Grand Jury, surrendered without protest by a witness.

Mr. Keating: Surrendered to whom, your Honor?

[fol. 44] The Court: To a representative of the District Attorney's office.

Mr. Birns: Your Honor, incidentally counsel to the Grand Jury.

Mr. Keating: The District Attorney's office did not subpoena these records. They have no right to the possession of these records. They got these records by trick and device.

The Court: They were subpoenaed for production before the Grand Jury; is that right, sir?

Mr. Keating: It was a command of the Grand Jury to produce these records before the Grand Jury.

The Court: And then voluntarily surrendered by the witness to a representative of the District Attorney's office, who is just now acting as counsel for the Grand Jury.

Mr. Keating: I wouldn't put it that way, your Honor. This man was not represented by counsel.

The Court: Did he produce, sir?

Mr. Keating: He had no way of knowing that they were not being surrendered—that the Grand Jury mandate was not being carried out by the District Attorney's office.

There was no way he could know. This is the only courthouse in the United States, your Honor, where the Grand Jury is tucked away in a dark corner of the District Attorney's office, and the entrance to the Grand Jury is the entrance to the District Attorney's office. This man had no way of knowing——

Mr. Birns: Your Honor, I never like to rise to object, but I think that the statement of counsel that the Grand Jury is not an independent agency is——

[fol. 45] Mr. Keating: I didn't say that yet, but I will.

Mr. Birns: There was no clearer way for you to say it than to say that the Grand Jury is tucked under the District Attorney's arm, which is a reflection, if your Honor please, upon the independence of everyone who sits as a member of the Grand Jury.

The Court: I won't subscribe to that statement.

Mr. Birns: I think it is out of order and uncalled for, your Honor.

The Court: Let us get right back to the issue. I am concerned, sir, with the propriety of the questions in the light of the Grand Jury's vote of immunity to the witness.

Mr. Keating: I want to make that clearly understood on the record, that because of the nature of this case and the questions that are raised and may be raised in the future, I have an obligation here to make a complete record. Whether I make it today or at some later date is immaterial.

Now, I am concerned with the legal point involved here, your Honor, not that the other points were not legal, but the immediate legal, the present legal point involved. Here I seek, and humbly seek information, because I understand that the manner in which immunity was voted to this witness before the Grand Jury was the subject of a fairly recent statute. I don't know, and I haven't had the chance, your Honor, to study it because, as Mr. Birns knows, I have been engaged in extensive litigation before the United States Labor Relations Board, and I got an adjournment today to be able to come in here this afternoon.

The defendant addresses these questions to you, your Honor. How extensive is the immunity granted by a Grand Jury of New York County under the statute under which

[fol. 46] the Grand Jury has the right to vote immunity to a witness? I would like to know how extensive that immunity is. Does it cover crimes committed on foreign shores? Does it give immunity against prosecution in another state? Does it give immunity, can a Grand Jury in the State of New York, on motion of the District Attorney of the County of New York, grant immunity to a witness against prosecution by the Federal Government?

The Court: These questions are rhetorical, but they answer themselves. Is that right, sir? You and I know the answers to those questions.

Mr. Keating: Now, because the Grand Jury of the County of New York cannot grant immunity against prosecution under a Federal statute, the position and the advice I gave this witness was given in good faith, and I will tell you why.

Mr. Birns: We are not questioning the good faith of Mr. Keating's advice. If he has a legal position to present to this Court, I am prepared to answer his legal arguments.

The Court: He is now coming to it. Mr. Keating now said he will tell us why he advised his client to refrain from answering. I think Mr. Keating should be permitted to tell the Court the reason.

Mr. Keating: If, as the District Attorney claims in this case, this man gave $500 to a union official, he has committed a violation of the Taft-Hartley Act.

The Court: Mr. Keating, there is no such contention, as I understand it. They merely asked a question——

Mr. Keating: They are asking him to answer certain questions, and all these questions revolve around a check, which is not evidence; a check in itself is not evidence.

[fol. 47] The Court: That is true, sir.

Mr. Keating: I don't know that the District Attorney has any additional evidence to support their contention in this case. If the check is the only evidence they have—and I claim it is illegally before the Grand Jury—and we could demand its return because it is unlawfully withheld by the District Attorney, it is in the hands of the District Attorney unlawfully, it is not before the Grand Jury properly, then there is no evidence before this Grand Jury, and what the District Attorney is trying to do is to get this man to admit that this is a check which he endorsed himself under the

signature of a man by the name of Goldberg, according to the writing on the document; and if the District Attorney is correct in his contention that this check represents a payment of money to a union official, then what we have here is a direct violation of the Taft-Hartley Law. I think this is a matter of common knowledge.

The Court: Let us assume this to be so. Does that give this witness the privilege of refraining from answering? You don't seriously contend that, do you, sir?

Mr. Keating: No, I don't. I don't know the answer to that, your Honor, but I am not as an attorney, advising this businessman, who has committed no crime that he is charged with, I am not going to advise him to go in and——

The Court: Are you through now, Mr. Keating? Have you advanced your legal arguments?

Mr. Keating: I am through insofar as giving an outline of the record I desire to make in this case at the earliest opportunity.

The Court: There is a presumption of regularity of Grand Jury proceedings. Have you anything to indicate [fol. 48] that the proceedings before the Grand Jury were not regular?

Mr. Keating: My communication to the Foreman was a recital of the facts in this case as I know them.

The Court: I have read it, sir.

Mr. Keating: I would like to call for the production of the subpoena duces tecum which was served on Mr. Knapp, and I would like to know, or have a record made, of exactly what has happened to that subpoena from the time it was surrendered. I think it is important to know what Grand Jury these books were examined before. I have no way of knowing. Mr. Knapp does not remember.

Mr. Birns: And I don't think that it makes any difference, your Honor.

The Court: It makes no difference. When do you want this witness back before the Grand Jury, sir?

Mr. Birns: Your Honor, it is nearly ten after 5:00. The jury has suspended for the afternoon, your Honor. They will reconvene on Friday, and the People request that you direct the witness to reappear and answer the interrogatories.

The Court: Based upon the record before me, I rule that the questions are proper in every respect, and I grant the application of the District Attorney, and I direct that the witness answer each and every question in the record to which refusal has already been made.

Mr. Keating: I would like to state for the record in conclusion at this stage of the proceeding, your Honor, what I think is happening here is not only a grave miscarriage of justice, it is the result of a grave maladminis-
[fol. 49] tration of justice in this county, and I am prepared to back up these statements and to document them.

Mr. Birns: That should prove very interesting. The only issue here is the application before the Court.

The Court: At what hour do you want this witness to appear before the Grand Jury?

Mr. Birns: Would your Honor direct the witness to reappear at 2:30 Friday afternoon?

The Court: At 2:30 the witness is directed to appear before this Grand Jury on April 27th. That is a direction of the Court: He is required by direction to answer all questions to which refusal has already been made.

Mr. Knapp: When do I have to appear on Friday, April 27th, where?

The Court: At the Grand Jury.

Mr. Knapp: What floor is that on?

Mr. Birns: You were there today. Just so that there will be no air of mystery about it, the Third April, 1956, Grand Jury on last Monday used the Grand Jury room on the sixteenth floor because of the necessities of the moment. The same Grand Jury convened on the ninth floor of 155 Leonard Street. The Third April, 1956 Grand Jury will reconvene on Friday in the same room where it was today.

Mr. Keating: May I have noted for the record whether or not this is the same Grand Jury that is conducting the investigation of Local 239, because the investigation was announced in March, before March 23rd.

Mr. Birns: Your Honor, there are a number of Grand Juries investigating different phases of organized racketeering.

Your Honor, may I keep this Grand Jury exhibit that was deemed marked in evidence?

The Court: Yes.

[fol. 50] COURT'S EXHIBIT 1 IN EVIDENCE

April 23, 1956.

To the Foreman:

Sir,

I am the attorney for Mr. Milton Knapp, a partner in the Eagle Reel & Mfg. Co., 410 Longfellow Avenue, Bronx, N. Y. Mr. Knapp is neither a complainant in any criminal case nor is he charged with a crime.

On Tuesday, April 3, 1956 he received at his place of business a subpoena *duces tecum* commanding him to produce certain books and records of the firm before a New York County Grand Jury at 155 Leonard Street, N. Y. C. on the following day at 2:30 p. m.

Mr. Knapp appeared promptly with the subpoenaed books and records and inquired for the location of the Grand Jury.

He was directed to the ninth floor where he surrendered the subpoena and instead of going before the Grand Jury was shunted by a representative of the District Attorney's office to a room on the eighth floor where he was introduced to a Mr. Lacter, an accountant employed by the District Attorney.

Mr. Lacter took Mr. Knapp to a room on the seventh floor where they were met by a Mr. Birns, an assistant district attorney. Mr. Knapp was asked to leave the room while Mr. Lacter and Mr. Birns examined his books.

Later Mr. Knapp was questioned by Mr. Birns who demanded to know whether a certain official of Local 239, [fol. 51] International Brotherhood of Teamsters, had extorted money from Mr. Knapp's firm in connection with a labor contract covering the firm's employees. After Mr. Birns spoke menacingly of taking Mr. Knapp before a Grand Jury, Mr. Lacter gave Mr. Knapp a receipt for certain records which were retained by Mr. Lacter.

Mr. Knapp was not represented by counsel during any of the foregoing. He did not know that his books and records were unlawfully obtained and withheld by an improper use of the Grand Jury process.

I therefore respectfully submit that in view of the nature of the investigation and the reputation of the persons involved and so that I may properly advise my client in this matter I must address the following questions to this Grand Jury.

1. Does this Grand Jury condone or condemn the abuse of process which in this case has resulted in an unlawful search and seizure?

2. Is the accountant who is now improperly in possession of certain books and records permitted by the District Attorney to engage in private practice? Has he ever been retained by anyone in the garment or trucking industries while he was employed by the District Attorney? Does he have any clients in either of those industries now?

These questions are asked in behalf of a small businessman who has been led to believe by what has appeared in the press that this investigation is being made in good faith. He sincerely hopes so. But before I can permit him to place his business, his life and his honor in jeopardy, I must know the answers to these questions.

"Reformers often have a cause which makes a short cut seem justified. But one of the main objects of our Con-
[fol. 52] stitution is to see that short cuts are not taken. Experience showed that once one man's rights could be tampered with, all men's rights were in jeopardy."

William O. Douglas "An Almanac of Liberty".

Respectfully submitted,

(Signed) WILLIAM J. KEATING,
60 Wall Street,
Wh. 3-6673.

[fol. 53] **Hearing—April 30, 1956**

Before: Hon. Mitchell. D. Schweitzer, Judge of the Court of General Sessions.

APPEARANCES:

For the People: Harold Birns, Esq., Assistant District Attorney.

For the Respondent: William J. Keating, Esq., and Bernard H. Fitzpatrick, Esq.

Mr. Birns: Now, with respect to this application, your Honor, the witness is here and his counsel are here.

The Clerk: Milton Knapp to the bar.

(The witness, Milton Knapp, steps forward and is seated at defense table.)

Mr. George M. Tisdale, Foreman of the Third Grand Jury for the April, 1956 Term of this Court, is present in Court. Mr. Harold Birns, Assistant District Attorney of the County of New York, is present in Court.

In the matter of the application of the District Attorney to adjudge Milton Knapp, a witness appearing before the Third Grand Jury of this Term of Court, in contempt of court.

Mr. Birns: Your Honor, this is an application to adjudge the witness, Milton Knapp, guilty of a contempt of court.

On April 25th last, your Honor, the witness appeared in this Court, accompanied by counsel; and at that time a motion was made for an instruction directing the witness [fol. 54] to return to the Grand Jury to answer certain questions theretofore put to him.

Your Honor, the witness did return to the Grand Jury on April 27th last. The specific questions which he had originally refused to answer were again put to him.

I must report to the Court at this time that the witness has continued and persisted in his refusal to answer those said questions.

I am prepared to have the transcript of those proceedings testified to now by the Court Stenographer, and then I will make my motion.

The Court: All right. Where is the stenographer?

Mr. Birns: The Grand Jury Stenographer, rather.
The Clerk: Grand Jury Stenographer.
(The prospective witness steps forward and takes the witness stand.)

HERMAN D. TARDY, Grand Jury Stenographer, 100 Centre Street, New York, N. Y., called as a witness on behalf of the People, being first duly sworn, testified as follows:

Mr. Birns: May I proceed?
The Court: You may.

Direct examination.

By Mr. Birns:

Q. Mr. Tardy, would you please read to the Court the questions asked of the witness Milton Knapp and the answers given by him at his last appearance before the Third [fol. 55] April, 1956 Grand Jury? That is, on April 27, 1956.

A. Mr. Birns made a statement to the Grand Jury as follows: "Mr. Foreman and members of the jury: the witness Milton Knapp was brought into the Court of General Sessions Wednesday last, the 25th of this month; and the Judge presiding there, the Hon. Mitchell D. Schweitzer, ordered Mr. Knapp to return to the Grand Jury today and answer the questions that were previously put, which he refused to answer. So, with the permission of the jury, I would like to continue."

Mr. Knapp was called into the Grand Jury room. The foreman stated to him: "Do you want to swear him?" Mr. Birns replied, "The witness has already been sworn.

"By Mr. Birns:

"Q. You may be seated. You are still under oath, Mr. Knapp, you understand?

"A. Yes.

"Q. You have previously been sworn.

"Mr. Birns: For the record: upon the appearance of the witness in the Court of General Sessions on Wednes-

day, April 25th, the Court stated as follows: And I am reading from page 32 of the transcript of that day: 'Based upon the record before me, I rule that the questions are proper in every respect; and I grant the application of the District Attorney, and I direct that the witness answer each and every question in the record, to which refusal has already been made.'

"And on page 33: 'The Court: (at 2:30) The witness is directed to appear before this Grand Jury on April 27th. This is a direction of the Court. He is required, by direc-
[fol. 56] tion, to answer all questions to which refusal has already been made.'

"Q. Mr. Knapp,——.

"A. Yes, sir?

"Q. I repeat the following question asked you on your first appearance here on April 23rd. I am reading from page 15 of your testimony:

'Q. Now, who represented the union in these negotiations leading to a salary increase?

'A. On the advice of my counsel, I respectfully refuse to answer on the ground that it may tend to incriminate me.'

"Q. Reading now from page 2 of your testimony of April 25th, and I ask you this question, which was previously asked of you:

'Q. Mr. Knapp, do you know a man named Philip Goldberg?

'A. On advice of my counsel, I respectfully refuse to answer on the grounds that it may tend to incriminate me.'

"Q. I read now from page 4 of the transcript, and ask you the said question:

'Q. Mr. Knapp, do you know whether Mr. Philip Goldberg is an official of Local 239 of International Brotherhood of Teamsters?

'A. On advice of my counsel, I respectfully refuse to answer the question on the ground that it may tend to incriminate me.'

"Q. Now I read to you from page 5, and ask you the following question:

'Q. Mr. Knapp, on or about October 28, 1955 did you give Philip Goldberg, a representative of Local 239, International Brotherhood of Teamsters, the sum of $500?

'A. On advice of my counsel, I refuse to answer on the grounds that it may tend to incriminate me.'

"Q. Now reading from page 6, I ask you the question:

'Q. Mr. Knapp, I show you this check, marked Grand [fol. 57] Jury Exhibit 1, of today's date, in the sum of $500, and ask whether you recognize it?

'A. On advice of my counsel, I refuse to answer on the ground that it may tend to incriminate me.'

"Q. I read now the question asked you on page 7 of your testimony of April 25th. I ask you the said question:

'Q. Mr. Knapp, on or about October 28, 1955 did you go to the Public National Bank & Trust Company, at 149th Street and Prospect Avenue, and cash this check, Grand Jury Exhibit 1, and receive from the bank the sum of $500?

'A. On advice of my counsel, I respectfully refuse to answer on the grounds that it may tend to incriminate me.'

"Q. On the same page, the following question, which I again ask you:

'Q. Mr. Knapp, on October 28, 1955 were you accompanied by Philip Goldberg, an official of Local 239, International Brotherhood of Teamsters, when you went to the Public National Bank & Trust Company, located at 149th Street and Prospect Avenue?

'A. On advice of my counsel, I respectfully refuse to answer on the grounds that it may tend to incriminate me.'

"Q. Referring now to the question I asked you on page 8, and I ask you the said question again:

'Q. Mr. Knapp, I again show you Grand Jury Exhibit 1, of today's date, and ask whether your handwriting appears upon the face of that check?

'A. On the advice of my counsel, I respectfully refuse to answer on the grounds that it may tend to incriminate me.'

"Q. On the same page, the following question was asked of you, and I ask you it again:

[fol. 58] 'Q. Mr. Knapp, I show you a stub book that appears to be a check stub book, and I ask you to examine this check stub book and tell me whether your handwriting appears on the space assigned to number 2904, that is the box,

'A. On the advice of my counsel, I respectfully refuse

to answer on the grounds that it might tend to incriminate me.'

"Q. On page 9, I asked you the following question, and I ask the question again:

'Q. Mr. Knapp, I direct your attention to the box number 2908, and I ask you to tell the Grand Jury what initial appears before the name Goldberg.

'A. On the advice of my counsel, I refuse to answer on the ground that it might tend to incriminate me.'

"Q. On page 10 you were asked the following question, and I ask the question again:

'Q. Mr. Knapp, I ask whether Grand Jury Exhibit 2, of today's date, is in fact a stub book used by the Eagle Reel & Manufacturing Company.

'A. On advice of my counsel, I respectfully refuse to answer on the ground that it might tend to incriminate me.'

"Q. On page 10 you were asked the following question, and I repeat the same question to you now again:

'Q. Mr. Knapp, when was the last time you spoke to Philip Goldberg?

'A. On advice of my counsel, I respectfully refuse to answer on the ground that it might tend to incriminate me.'.

"Q. On page 11, the following question was asked you, and I ask it again:

'Q. Do you know a man named Sam Goldstein?

'A. On advice of my counsel, I respectfully refuse to answer on the grounds that it might tend to incriminate me.'

"Q. On page 12, you were asked the following question and I ask it of you again:

[fol. 59] 'Q. Did you ever pay or give any sum of money —Withdraw that.'——

"On page 12 I asked you the following question, and I ask you the question again:

'Q. Isn't it a fact that Sam Goldstein is an official of Local 239, International Brotherhood of Teamsters?

'A. On advice of my counsel, I refuse to answer on the ground that it might tend to incriminate me.'

"Q. On page 12 I asked you the following question, and I ask it of you again:

'Q. Did you ever pay or give any sum of money to Samuel Goldstein?

'A. On the advice of my counsel, I refuse to answer on the ground that it may incriminate me.'

"Mr. Birns: Mr. Foreman, in view of the refusal now to answer questions asked of him, and in view, although directed to answer the questions by Judge Schweitzer on April 25th last, I ask you to instruct the witness now to report in Part One of General Sessions, where the People will make the proper application to punish this witness for contempt of court.

"The Foreman: Mr. Knapp, will you go to Part One, where you were on Monday with Judge Schweitzer, with your attorney?

"The Witness: My attorney is not available today, sir.

"The Foreman: You go there anyway.

"The Witness: I will go there, yes. Part One of General Sessions."

COLLOQUY

Mr. Birns: Now, if your Honor please, the People now contend that the persistent refusal of the witness to answer the said questions is contumacious and unlawful. [fol. 60] And I therefore direct an order adjudging the witness in contempt of court, pursuant to Sections 750 and 751 of the Judiciary Law.

The Court: Does counsel desire to be heard on that?

Mr. Keating: Yes, your Honor.

I would like to note, for the record, that I am joined today by my associate, Mr. Bernard H. Fitzpatrick, who will address the Court, with respect to the legal, oral argument in this case. But preliminary to that, I would like to raise for the record several questions.

Last Wednesday afternoon, in this Court, I think I asked for the production of the subpoena duces tecum which was served on Milton Knapp on April 3, 1956 at his place of business, and I think it was indicated that that would be produced at this time.

Mr. Birns: Your Honor, I don't have the original of the subpoena. I have here a typewritten copy, on tissue paper. I have no recollection as to whether the original was turned in to me or not. If it is available, I'll produce it—that is, if I can find it and I do have it.

The Court: You represent that what you hold now is a typewritten duplicate——

Mr. Birns: —is a tissue paper, which is made when the original is made; and the superimposing of the tissue paper would constitute the subpoena as received by the witness.

The Court: Hand that to counsel.

Mr. Birns: Yes, your Honor (handing).

The Court: Do you want to offer that in evidence, for any reason?

Mr. Keating: Yes, I would.

First, I would like to know—if the information is available—by what Grand Jury——

[fol. 61] The Court: Now, we have gone through that, Mr. Keating. This is the Third April, 1956 Grand Jury.

Mr. Keating: I think there has been no showing to date that this particular subpoena was issued by the Third April Grand Jury, as far as I know.

The Court: Well, that is the Grand Jury that was investigating the alleged crime in this case.

Mr. Keating: Has the District Attorney stated for the record that this subpoena was issued by the Third April Grand Jury?

Mr. Birns: The District Attorney states, your Honor, that, as counsel for the Grand Jury, I issued the subpoena, as permitted to do so by the Code of Criminal Procedure.

Mr. Keating: By the Third April Grand Jury?

The Court: I don't understand what you mean. The Grand Jury didn't issue any subpoena. Counsel, the District Attorney of this County, issued this subpoena duces tecum.

Mr. Keating: Then we do not know then—the District Attorney does not tell us—before what Grand Jury, or what term of the Grand Jury, these books were commanded to be produced.

Mr. Birns: I don't know just what counsel means. I do state, your Honor, as is apparent from the record, that there is a proceeding before the Third April 1956 Grand Jury, which involves Local 239 of the International Brotherhood of Teamsters.

The Court: Do you want to see this any further? Do you want to examine this?

Mr. Keating: Yes, sir.

May I invite your Honor's attention to Section 609 of the Criminal Code, to the effect that "the District Attorney [fol. 62] of the County may issue subpoenas, subscribed by him, for witnesses within the State, in support of the prosecution, or for such other witnesses as the Grand Jury may direct to appear before the Grand Jury upon an investigation pending before them."

The question I raise by my line of questioning—by my line of argument on this issue is that the record does not show to date whether there was an investigation pending before any Grand Jury with respect to the inquiry involving Milton Knapp. And, certainly, we do not know before what Grand Jury, or what Term of what Grand Jury, the books and records of Milton Knapp were commanded to be produced. The District Attorney takes the position, apparently, that he does not have to give that information.

The Court: You mean, in the subpoena itself?

Mr. Keating: Here and now, sir.

The Court: He has already indicated it at least twice. Do you want him to state it again?

Mr. Keating: I think there is a misunderstanding between you and the District Attorney as to what the District Attorney has said with respect to this question.

Mr. Birns: I dare say there is no misunderstanding on that point between the Court and the District Attorney. I think, if there is any misunderstanding, it is between counsel and myself.

The Court: Do you question the validity of the subpoena duces tecum?

Mr. Keating: Under the wording of Section 609, Section 609 raises the question that before the District Attorney may issue a subpoena there must be an investigation pending before the Grand Jury. There is no showing on this [fol. 63] record that there was an investigation pending with respect to the subject matter in this case in any Grand Jury. And, in any event, we have not been told yet, for the record, to what Grand Jury these books were commanded to be produced.

Mr. Birns: I don't think the law requires me to specify before which Grand Jury the books were commanded to be

produced. The fact is, I did produce them before a Grand Jury. And if it will facilitate the proceedings here, your Honor, I may state that Mr. Knapp was not the only witness called before this Grand Jury. My recollection may be wrong, but I think it is correct when I say that some time during the first week of April, 1956, a Grand Jury proceeding, involving Local 239, was actually commenced before the Grand Jury by the appearance of witnesses. I can check that in a minute by referring to the official minute book of the Grand Jury. If it is counsel's point that I issued this subpoena willy-nilly, and then brought Mr. Knapp into the Grand Jury to substantiate the charge, he is in error.

Mr. Keating: I did not use the words "willy-nilly". And I think it is more important than the situation described by the words "willy-nilly".

The Court: Do you question the validity of the subpoena? Are you moving to quash it? What is it you desire to have the Court——

Mr. Keating: I would like to have this record clear on this point, so that the proper motion can be made at the proper time: I do not know at this time whether there was a properly-instituted investigation pending before any Term of any Grand Jury in this Court at the time that this subpoena duces tecum was issued. I think I described in detail what happened from the time that Mr. Knapp [fol. 64] received the subpoena duces tecum. He came down to the office of the District Attorney, which is the address of the Grand Jury in this particular County. And when he was directed to the Ninth Floor, where the Grand Jury is situated, within the Office of the District Attorney, he was met by a representative of the District Attorney's Office, who, instead of taking him into the Grand Jury where he had been commanded to appear with his books, he was directed down to the office of the accountants who are employees of the District Attorney. From there he was taken down to the office of Mr. Birns. And before his books were ever got to the Grand Jury, Mr. Birns and an accountant, an employee of the District Attorney's Office, who may or may not have clients outside of the office, went over these confidential books and papers of this man. And then he was

questioned with respect to them; and the accountant gave Mr. Knapp a receipt for certain portions of these records and documents.

Now, the record shows only some evidence that at the time Mr. Knapp was questioned in the Grand Jury, certain of these books and records were referred to in the Grand Jury. At this time there has been no showing that the books and records ever were taken before the Grand Jury in the proper procedure——

The Court: Well, did there ever come a time when these records were brought before the Grand Jury and marked in evidence?

Mr. Birns: Your Honor, the record that was read today, and the last time, referred to these particular records as Grand Jury 1 and Grand Jury 2, exhibits of April 25th. I think my memory is correct on that.

[fol. 65] Let me say to your Honor: I think I have gone beyond what I should have stated. Because I think it is a fundamental rule of law that the strongest type of presumption attaches to the validity of a Grand Jury investigation. And the burden is not upon me to show the validity of that investigation. If there is any question as to its validity or invalidity, let me say the burden rests upon Mr. Keating.

The Court: Well, that is what he seeks to do now, sir.

Mr. Birns: But he is not doing it, except by raising questions.

Mr. Keating: Now I have the additional information that these books were taken before the Grand Jury and referred to as exhibits of April 25th.

Now, on April 23rd, your Honor,——

The Court: I think that was made known at a hearing last Wednesday, April 25th.

Mr. Keating: Yes. But I invite your attention now to the fact that there is, as a part of the record in this proceeding, a letter addressed by me to the Foreman of the Grand Jury, which is to date unanswered or unacknowledged, in which I raised the question of the impropriety of the District Attorney in the process of his subpoena.

The Court: Who did you want to answer your letter?

Mr. Keating: I addressed the Foreman of the Grand Jury.

The Court: Is he under any obligation to answer your letter, or to proceed upon certain conditions prescribed in your letter?

Mr. Keating: The Foreman of the Grand Jury is certainly under no obligation. But a citizen has a right to inquire of the Grand Jury——

[fol. 66] The Court: Of course. The only issue is whether or not the questions fall within the realm of propriety. I think, questions that the witness should answer are those, where it appears affirmatively that the Grand Jury has granted the witness complete immunity. Now, I ruled on that. On Wednesday I directed the witness to return on Friday. As the record now stands, he did return, and he again persisted in his refusals to answer questions which the Court has already ruled are proper. Now, pick it up from that point.

OFFER IN EVIDENCE

Mr. Keating: All right, sir.

Now, subject to getting the original of the subpoena duces tecum served upon Milton Knapp on April 3, 1956 at his place of business, I offer in evidence, as a Respondent's exhibit, the carbon copy, plus a blank, of an original subpoena duces tecum.

Mr. Birns: I have no objection.

The Court: Mark it.

(Carbon copy of subpoena duces tecum, and paper attached thereto, were received in evidence and marked Respondent's Exhibit A.)

COLLOQUY

Mr. Keating: Now, if your Honor please, I would like to yield to my associate, Mr. Fitzpatrick. Thank you, sir.

Mr. Birns: May I just say this for a minute? Just so that there is no misunderstanding about a statement made by counsel: he injected, for some reason best known to him, the fact that an accountant employed by the District Attorney's Office he believes has outside practice.

[fol. 67] First, I question the accuracy of his statement, as presented by counsel. And secondly, I submit to your

Honor that even if accurate, it has no relevancy in these proceedings.

The Court: Other than this: I gather from his statement, at least by innuendo, that the accountant employed by the District Attorney's Office had access to confidential records of this witness, which might conceivably be used to this witness's prejudice because of his alleged outside practice. I believe that is the inference that you intended to convey to me: is that right, sir?

Mr. Keating: Yes. And I think the word "innuendo" was improper, because this was a paragraph in my formal letter to the Foreman of the Grand Jury, and it certainly was no innuendo: It was a statement of——

The Court: I haven't got that letter.

Mr. Birns: I have it, your Honor.

Mr. Keating: It is a part of the record in this case, sir.

Mr. Birns: Your Honor permitted me to hold it, at the conclusion of the hearing.

The Court: Yes. May I see it again, please?

Mr. Birns: Yes, sir (handing paper to the Court).

The Court: Mr. Keating, may I ask you this question: Have you any factual basis for making that statement? Or is it something you are dreaming up, something you are surmising?

Mr. Keating: Sir, as an attorney representing a man like this, in a case like this, addressing an inquiry to the Grand Jury, I would certainly not dream anything up. I made certain inquiries of the Grand Jury. I don't know why the Grand Jury ignored my communication—didn't [fol. 68] even acknowledge it. I don't know whether it was on the advice of the D. A., who was counsel to the Grand Jury, or not. The communication went unacknowledged and unanswered. I think it was made in good faith.

Mr. Birns: I don't think the communication was unacknowledged, because it is right on the record of the Grand Jury testimony.

Mr. Keating: And certainly, two days after the communication was addressed to the Foreman, then for the first time the books and records of this man became an exhibit before the Grand Jury, after having been subpoenaed three weeks before.

Mr. Birns: I don't think you are going to try to tell me how to present a case to the Grand Jury, Mr. Keating.

The Court: Have you a copy of your letter in front of you?

Mr. Keating: Yes, sir.

The Court: You said you made a direct accusation in your letter, sir, with respect to this——

Mr. Keating: I did not say I made a direct accusation. I said I asked questions. And it was not an innuendo. I mean, the phrase "innuendo" was used with respect to the oral remark made in this Court, and I said that my reference in this Court today was not the first reference that I made to this particular question. I addressed a legitimate inquiry to the Foreman of the Grand Jury, which has gone unanswered and unacknowledged.

The Court: Well, the inferences in your letter seem to bear out what I said.

Mr. Keating: Oh, I will stand on those, sir.

Mr. Birns: Now, I may state, your Honor, unless counsel can tell the Court otherwise, that there is nothing in the [fol. 69] law which prevents any accountant in the employ of the District Attorney from having an outside practice.

Mr. Keating: I am satisfied with that, sir.

The Court: The danger in this kind of a procedure is getting involved in some collateral avenue of inquiry which doesn't concern the instant application at all, and that's what I abhor.

Mr. Keating: You will recall, your Honor, that when I read this letter into the record, I omitted—I purposely omitted—that portion of it——

The Court: Now, you raised it today, though.

Mr. Keating: I raised it because I think there has been ample time for the Grand Jury to take appropriate notice of the questions I raised, and they haven't been answered. I think it is a serious question.

Mr. Birns: Your Honor, the only question here is the issue whether or not the refusal of this witness to answer is unlawful.

The Court: All right. I will hear you, sir.

Mr. Fitzpatrick: Before making the argument which I plan to address to the Court, I would like a few more additional facts in the record.

Now, I think the facts are of such a character that the District Attorney will readily concede them. And I am going to try to get them in in that order.

Will it be conceded, Mr. Birns, addressing it through the Court,——

Mr. Birns: Yes, sir?

Mr. Fitzpatrick: —that Mr. Goldstein, who was referred to at page 13 of the minutes of April 25th, is the president of Local 239, International Brotherhood of Teamsters?

[fol. 70] Mr. Birns: Well, all I can say, sir, is that to my knowledge he is an official of that local. Specifically what position he holds, I can't tell at this moment.

Mr. Fitzpatrick: And will it be conceded that Philip Goldberg——

Mr. Birns: Does that satisfy you?

Mr. Fitzpatrick: That satisfies me, yes.

Will it be conceded that Philip Goldberg is the recording secretary and a business agent of the same organization?

Mr. Birns: Well, I can only let my concession go so far as to say that to my knowledge he is an official of the union. He may be what you say he is, but at this time I can only stand on the fact that he is an official.

Mr. Fitzpatrick: That satisfies me.

The Court: All right.

Mr. Fitzpatrick: I am going to show Mr. Birns a copy—I believe it is the original—original counterpart of a contract, a collective bargaining agreement, between Eagle Reel Manufacturing Company and Local 239, of the International Brotherhood of Teamsters. And I am going to ask from him a concession that that is the contract which was in effect between October 28, 1954 and a year thereafter, which was extended by a memorandum made 28th of October, 1955, for an additional period (showing paper to Mr. Birns).

Mr. Birns: I don't see, your Honor, how I can concede what a contract was, or whether it is the one. I haven't had the opportunity to speak to any witness with respect to this.

Mr. Fitzpatrick: I will withdraw the question.

The Court: Sir, has that contract any bearing on any issue in this hearing, sir?

[fol. 71] Mr. Fitzpatrick: Oh, yes, sir; very definitely.

The Court: Would you be satisfied if the witness were sworn and were to identify this contract?

Mr. Birns: Well, if counsel says this is the contract,——

The Court: Would you accept it?

Mr. Birns: —I certainly would accept it.

The Court: He will accept it, sir.

Mr. Birns: I will accept counsel's word.

Mr. Fitzpatrick: All right. May they be marked as exhibits then, your Honor?

The Court: Do you have any objection?

Mr. Fitzpatrick: I suggest that they be marked Respondent's 1 and 1-A, respectively.

Mr. Birns: If counsel states that his client signed this contract on behalf of his partnership, and that Bernard Stein signed this contract on behalf of the union, I will be satisfied with counsel's statement. I have no way of knowing.

Mr. Fitzpatrick: (Addressing witness Knapp.) Is that so?

The Witness, Knapp: Yes.

Mr. Fitzpatrick: Counsel so states, after inquiry.

The Court: Mark it.

(Copy of contract, above referred to, dated October 28, 1954, was received in evidence and marked Respondent's Exhibit B.)

Mr. Birns: If counsel also states that Edward Blywythe, a partner of the witness, signed on behalf of the Company on the 28th of October, 1955, and Philip Goldberg signed on behalf of the union, I certainly would be satisfied with that.

[fol. 72] (Mr. Fitzpatrick confers with the witness Knapp, off the record.)

(Copy of contract dated October 28, 1955, above referred to, was received in evidence and marked Respondent's Exhibit B-1.)

Mr. Fitzpatrick: Will it be conceded, Mr. Birns, asking you through the Court, that the Philip Goldberg who is a signatory to the exhibit last introduced, namely Exhibit B-1, is the same Philip Goldberg who is the subject of

your questions, particularly those on pages 7, 8 and 10 of the transcript of April 25th?

Mr. Birns: I think it is a fair inference that it is the same person, your Honor. But again I say, I wasn't present when the contract was signed. Counsel is asking me to make certain concessions. All I can say, your Honor, is that we are interested in the activity of a Philip Goldberg, said to be an official of Local 239. That is as far as I can go.

Mr. Fitzpatrick: I will accept that as a proper answer.

I now ask the learned District Attorney if he will examine an Exhibit which I have had prepared in duplicate so that he may retain a copy. The general nature of the exhibit, which is a form customarily used by the National Labor Re'ations Board, is designed to show the involvement of the partnership, of which Mr. Knapp is a partner, in interstate commerce. And I ask him whether he will concede that such fairly describes the business of the partnership, of which the Respondent is a partner.

Mr. Birns: Your Honor, I have no knowledge of whether or not Mr. Knapp is so engaged in commerce as to make [fol. 73] him—as to put him within the inter-state commerce provisions of the Taft-Hartley Act. I submit, further, that it is immaterial whether he is or not, and I refuse to so concede.

Mr. Fitzpatrick: Will counsel concede that the Respondent, if questioned, would testify that that is the fact?

Mr. Birns: Your Honor, I have no reason to protract these proceedings. I take it that what is being done here now is an effort to show that by the answers which the witness may give before this Grand Jury he might possibly become involved in a violation of the Taft-Hartley Act. I say, whether he does or whether he is involved or he isn't is actually beside the point. We are seeking to determine whether or not the crimes of conspiracy—that is a crime under the Penal Law of the State—and the crime of bribery of a labor official, also a crime under the Penal Law of the State, has in fact been committed. And the immunity which has been granted to this witness is with respect to his involvement in each of these two crimes. I think, as to whether he would be a violator of the Taft-Hartley Act is beside the point.

Mr. Fitzpatrick: Well, I wouldn't comment generally on that, except to say that counsel erroneously interprets the purpose for which the offer is made.

The Court: Do you want to make a statement, sir,——

Mr. Fitzpatrick: I do, however,——

The Court: Would you make a statement, sir, as to the purpose of this inquiry?

Mr. Fitzpatrick: Well, let me say this, your Honor——

[fol. 74] The Court: What are you pressing this for?

Mr. Fitzpatrick: I am pressing this as a general objection to the jurisdiction of the Court in respect of its investigation of the very crime which counsel has just referred to.

The Court: When you refer particularly to the document you are holding in your hand, how does that fit into the pattern?

Mr. Fitzpatrick: This simply establishes that there is an involvement of the partnership of the witness in interstate commerce, so as to bring into play Sections 302a through g of the Taft-Hartley Act, which appear as 29 United States Code, Section 186. And that is the only purpose for which it is offered at the moment. Nothing is said about the inability of this Court to grant immunity in respect to prosecutions under that Section. I simply want to establish the fact that that Section is applicable to transactions in this business, and that this business is in interstate commerce.

Mr. Birns: I say, even if it is, certainly the Taft-Hartley Act would not make it impossible—it wasn't designed to make it impossible for a State to effect its sovereign powers of looking into the commission of crime and punishing the commission of crime.

Mr. Fitzpatrick: Well, let us not anticipate the argument. Let us get the facts on the record, of course, before we make the argument.

The Court: You are seeking a concession from the District Attorney, is that right?

Mr. Fitzpatrick: That is right, sir. If he will concede that the witness, if called, will testify that this paper which I hold in my hand fairly represents the facts that the Eagle [fol. 75] Reel & Manufacturing Company is involved in inter-state commerce——

Mr. Birns: You want me to assume, for the purpose of this argument, that this company is engaged in inter-state commerce? Is that it?

Mr. Fitzpatrick: No, I didn't ask that. You can argue that they are not in inter-state commerce. This simply sets forth the facts upon which that conclusion is to be drawn.

Mr. Birns: I am willing to assume, for the purpose of this argument, that this company is engaged to a certain extent in inter-state commerce.

The Court: Does that satisfy you, sir?

Mr. Fitzpatrick: That will satisfy me, sir.

The Court: All right.

Mr. Fitzpatrick: All right.

I will ask a further concession from the learned Assistant District Attorney. Possibly it is covered by his last concession, but I would like to ascertain it: that Local 239 of the International Brotherhood of Teamsters is a union which is in compliance with Sections 9f, g and h of the Taft-Hartley Act, having filed the requisite papers with the Secretary of Labor and the National Labor Relations Board.

Mr. Birns: Is that the provision which requires the filing of a non-Communist affidavit?

Mr. Fitzpatrick: That is so. And the financial statements, and the Constitution and rules of order, and the like.

Mr. Birns: I am not going to make any such concession, your Honor. I don't know——

Mr. Fitzpatrick: I offer to prove by the record of the National Labor Relations Board that such is the fact. I will have to have an adjournment, of course, to produce the [fol. 76] certificate. They tell me it takes two weeks to get a certificate out of Washington, sir.

The Court: What I am interested, sir, is to ascertain how this proof is relevant on the present application of the District Attorney to adjudge the witness in contempt of court?

Mr. Fitzpatrick: I think I shall be able to demonstrate to your Honor's satisfaction that the National Law has completely displaced the State Law in this field; that this

Court has no authority in respect of even the investigation which is pending before it, and certainly none in connection with the proceedings to commit this particular witness for contempt. I will make my argument, but first I wanted to make a record which is adequate to support it.

Now, I state to the Court that before coming into the courtroom I called the National Labor Relations Board's local office, and spoke to its person in charge of compliance, and asked whether Local 239 was in compliance with the National Labor Relations Act, and was informed that it was.

Will counsel take my statement to that effect?

Mr. Birns: I wouldn't quarrel with any statement counsel makes, your Honor. I am not questioning the good faith of his argument. But I say——

Mr. Fitzpatrick: I haven't gone into the argument yet. I will——

Mr. Birns: Well, I'm trying to anticipate it. You really can't blame me for that.

Now, your Honor, as I understand it, the only purpose of the filing of a non-Communist affidavit by a labor union official is to deprive him of the right to institute an unfair [fol. 77] labor practice before the National Labor Relations Board. Whether they do or don't file such an affidavit has no bearing on this issue. There is only one question here, your Honor; whether or not the refusal of this witness to give answers to my questions, or the proper questions asked before the Grand Jury, is lawful. And whether it is lawful is determined under the laws of the State of New York.

The Court: I quite subscribe to what you say. But at the same time, I have never shut counsel off summarily and said "Don't give me that argument". Because I am sure he has studied this problem, and has some basis for advancing it; and I want to afford him every opportunity of briefing it, if necessary.

Mr. Birns: I am just trying to accentuate my position.

The Court: I understand it.

Mr. Birns: I wouldn't certainly consider asking your Honor to cut counsel off.

The Court: I don't think any Court should plunge head-

strong into punishing, if there is some sound basis for denying it,——

Mr. Fitzpatrick: Thank you.

The Court: —and legal ground for it. But I will say, up to now I have heard none.

Mr. Fitzpatrick: No, I haven't so argued yet.

The Court: All right.

Mr. Fitzpatrick: I have sketched out the argument. I haven't given it to you.

I think my record factually is complete enough at the moment, so that I may now proceed with the argument.

The Court: All right.

Mr. Fitzpatrick: And for the convenience of the Court, I would like to hand up this pamphlet copy of the Taft-[fol. 78] Hartley Act, turned to the appropriate page, Section 302 (handing to the Court).

The Court: All right, sir.

Mr. Fitzpatrick: If your Honor please, this investigation which is before you, is initiated in order to discover, among other things—perhaps exclusively—violations of the New York Penal Law, Sections 380 and 580, and other crimes.

The Court: What is the last one?

Mr. Fitzpatrick: 580. —580, I may say to your Honor, is merely the conspiracy section, which proceeds upon the assumption of 380.

Section 380 I will sketch briefly from the statute which I have before me: "A person who gives, or offers to give, any money, property or other thing of value to any duly appointed representative of a labor organization, with the intent to influence him in respect to any of his acts or decisions, or other duties, as such representative, or to induce him to prevent or cause a strike by the employees of any person or corporation, is guilty of a misdemeanor."

"Any duly appointed representative of a labor organization who solicits or accepts, or agrees to accept, from any person, any money, property or other thing of value, upon any agreement or understanding, express or implied, that he shall be influenced in respect to any of his acts, decisions, or other duties as such representative, or upon any agreement or understanding, express or implied, that he

shall refrain from causing, or shall prevent, a strike, or work stoppage, or any form of injury to any business, is guilty of a misdemeanor."

Schematically, your Honor, that is expressive of the same field of legislation as 29 U. S. C. 186, the Taft-Hartley Act.

[fol. 79] Briefly,—I wouldn't read the whole thing, but merely the first two sections:

"It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money, or other thing of value, to any representative, or any of his employees who are employed in an industry affecting commerce;

"(b) It shall be unlawful for any representative, or any employees who are employed in an industry affecting commerce, to receive or accept, or to agree to receive or accept, from the employer of such employees, any money or other thing of value."

Now, (c) is a list of the exceptions to that. It enumerates some five types of exceptions: welfare funds, and the like being included there.

Now, the Section is to be administered civilly by the District Courts of the United States. That appears by said Subdivision "e", wherein they are granted the power to restrain violations of the Section. It is also punishable criminally in forums of the United States, as appears by Section "d". It is made a misdemeanor.

The concluding sections are not presently material to the argument.

Now, what I want to call to the attention of the Court is that that is a comprehensive regulation of the conduct as between employers and representatives of employees in commerce, with respect to payments passing between them. Perhaps "comprehensive" is too small a word to use. It's "exhaustive". In other words, there is no form of payment, as between the representative of the employee [fol. 80] and the employer, which is not covered by this enactment—the Federal enactment.

Stated conversely, the licitness or illicitness of a payment to a representative is wholly determinable from the face of this statute. If a payment made is rightful, it's to be determined according to the standard of conduct set up

by the Congress in the Taft-Hartley Act. If it is contended that the payment to a representative was wrongful, where do we find the standard? We find it exactly in the same place: the standard of conduct set up by Congress.

This is a complete regulation of the validity, the invalidity, the lawfulness, the unlawfulness, the illicitness, the licitness, of payments. Congress has moved in and occupied the whole field, to the exclusion of any State power, to make licit what the Congress has declared illicit, or to make illicit that which the Congress has declared to be otherwise.

The Court: Have you any authority for that statement, sir?

Mr. Fitzpatrick: Yes, sir. That is well backed up by the Supreme Court of the United States. Its leading case is Garner against the International Brotherhood of Teamsters, which is reported in 74 Supreme Court, at 161. The doctrines of the Court have been—that doctrine—it is now known as the "Garner Doctrine"—has been developed in succeeding cases: Weber against Anheuser Busch, which was decided at the last term. Unfortunately, I don't have the citation. It was again adverted to, and affirmed in principle, only last week, in the decision written by Mr. Justice [fol. 81] Burton, which was an eight-to-one, in the case of United Mine Workers against the Arkansas Oak Flooring Company.

Briefly, the situation in the Teamsters case was that the teamsters picketed in order to secure recognition. The employer, who was able to establish the fact that most of his employees did not desire the Teamsters as their representative, obtained an injunction from the local State Court. That was upset on the theory, which is partly, I would say, along these lines: that where the subject matter of the charge has been completely legislated by Congress, no room is left for State action. And, secondarily, that where Congress has set up a tribunal, and invested it with specific jurisdiction to determine the incidents of the devolution of that law, then that is the only tribunal which can occupy the field. In this case it was the National Labor Relations Board.

Now, this has been applied, not only to statutes which you can see are civil regulations: it was applied in Weber

against Anheuser Busch, in the case of the anti-trust laws. In Weber against Anheuser Busch there was a labor difficulty which the employer sought to solve by bringing a civil proceeding, but based upon the anti-trust statute of Missouri, a statute with criminal implications. The Supreme Court of the United States refused an injunction in that case because they said that even though the public policy of Missouri, as expressed in this anti-trust law with its criminal implications, was involved, that the fact that Congress had elected to regulate conduct of the character sought to be enjoined completely disposed of the possibility of any State action in the field. I don't think Arkansas Flooring added very much to the doctrine. It merely re-emphasized it.

[fol. 82] But I want to say that on the basis of a comparison of the two statutes, a comparison of the field they pretend to regulate, and in consideration of the Garner doctrine, this Court nor its grand jury has no power to inquire into the matter. The State cannot regulate or pass regulations for the conduct of payments as between an employer and employee.

The Court: Now, if I may interrupt,—and I don't usually do this—I just do this for purposes of clarification: Do you characterize Section 380 of the Penal Law as a regulatory statute?

Mr. Fitzpatrick: Oh, yes, sir. It purports to say what is illicit. Unlike the Federal statute, it does not say what is licit. It simply says what is illicit in this field; but to that extent it regulates. It says "You may not make such-and-such a payment." "You may not make a payment under certain circumstances." But the Federal Government has already stepped in and said under what circumstances the payments may be made. They are the circumstances listed in paragraph 3, subsection C, of the Federal statute which I have cited. The code of conduct prescribed by the Federal Government is absolutely complete and comprehensive. It excludes any possibility that a payment cannot be judged by.

I notice that there are some differences between the statutes on the criminal side. For instance, your State regulation here makes it an element of a crime that there be an intent to influence the representative. There is no

such element appearing in the Federal regulation. The Federal regulation proceeds simply on the theory that a payment for a set purpose is unlawful unless it is one of [fol. 83] a number of listed purposes set out in Section C.

Your second section here lays the obligation—rather, the first subdivision of 580 lays the obligation on the employer to refrain from giving. The second section lays the obligation on the representative of the employees to refrain from accepting. That structure is paralleled by the first two sections of the Federal statute. The employer may not give, according to the subdivision A. The employee-representative may not receive, according to subdivision B.

Let me say that there was originally a doubt about the construction of the Federal statute as to whether the term "representative" applied to the certified representative of the employees. The Second Circuit Court of Appeals thought that it did not, and consequently in Ryan against the United States—I don't know whether I have my certiorari reversal proper or not—it set aside a conviction of Mr. Ryan on the theory that not an individual but a labor organization must be the offending party under the Section. The Supreme Court, in the United States against Ryan, decided on February 27th, held that an individual, such as Mr. Ryan, was capable of committing that crime and was described by the term "representative" as used in that statute.

I regret that our work has had to be done under a bit of a rush here, your Honor. We have had just the week-end to think this over—at least, I personally did. I think perhaps that full explanation in a brief is called for. And if your Honor desires to have a brief, I will be glad to prepare one.

The Court: Well, your argument, certainly, is unique. It may not be persuasive.

[fol. 84] Do you want to be heard further, sir?

Mr. Birns: Just on this one point, your Honor: In the first instance, your Honor, the Federal statute and the State statute are not identical as they were, according to my recollection, in the Garner case. And in the Anheuser case, cited by counsel, the applications were each for an injunction, and they were not proceedings following crim-

inal statutes. In other words, there wasn't an attempt at prosecution in either one of the statutes. It was an attempt by each of the party-plaintiffs to secure an injunction.

The question here, apparently, as raised by counsel, whether Congress has so pre-empted the field as to frustrate the State in permitting it to punish for violations, what the State considers it to be violations, of criminal law. I say, in my opinion, sir, that is not so, and I submit that to the Court. I can think offhand of situations where Congress has, in its wisdom, made the theft of an automobile and the transportation of that car over a State line, a Federal crime. But certainly counsel would not say that the receipt of that car, taken over a State line—the receipt of that car in New York State wouldn't make the possessor of that car subject to the violation of the criminal law of the State,——

The Court: And I am thinking of narcotics cases.

Mr. Birns: —if that were established, and that is the position of the People.

Mr. Fitzpatrick: I have two comments, if your Honor please. One is—let me see if I can express a little bit more clearly than has been expressed in the Garner case: The Garner case, in Pennsylvania, arose under these cir- [fol. 85] cumstances. There was a State Labor Relations statute, roughly paralleling the Wagner Act, or such parts of the Wagner Act as are incorporated in the Taft-Hartley Act. In other words, there was parallel legislation, as counsel has stated. And the Supreme Court held that the State and Congress would, in substance,—were trying to regulate the same thing. They could not both regulate that same field. That much is true.

I might also, just in order to be completely honest with the Court, say that there is a reference in the Garner opinion, or in the Garner opinion, to the effect that certain criminal consequences are not covered by the decision. I don't think, however, that is applicable here. I merely state it to be completely honest with the Court,—in the description of the opinion. I do say, however, that in Weber against Anheuser-Busch, the statutes were not definitely not in pari materia. The statute of Missouri, which was involved in that case, was an anti-trust law, a law with

criminal implications, although a civil use was sought to be made in the injunction. That is my first comment.

Now, my second comment deals with the question of whether, as your Honor has mentioned, a narcotics case might be made punishable by the Federal as well as by the State authorities. That is a distinguishable situation. And that is why I directed a great deal of emphasis to describing to your Honor the comprehensiveness of the Federal regulation. I could concede that if Congress merely passed a statute which said thus-and-so conduct is criminal, then Congress has not regulated the field fully. But Congress has gone a step further. It has said "Let us take this whole [fol. 86] subject of payments to employee-representatives. Let us draw the line. On this side is what is right, and on the other side is what is wrong." Congress has done that. It has specified the right and the wrong. And it is not up to the State thereafter to say what is right or wrong; because the State might say that a payment which is right by Federal law is wrong by State law.

Mr. Birns: I have made my position, your Honor.

The Court: All right. Now, may I suggest this: that the witness be directed to return to the Grand Jury at a future date, the date to be agreed upon by counsel? I think the District Attorney and counsel for the Respondent should agree upon a date in which briefs may be exchanged. Argument has been advanced. I think the witness is entitled to at least the Court's consideration, to the extent of reading the briefs, examining the issues, exploring the arguments advanced by counsel with respect to whether or not the Federal government has so pre-empted the field so as to exclude the State from enforcing the provisions of its own statutes. That is the issue.

Mr. Fitzpatrick: That is the issue, sir, precisely.

The Court: And you say that basically it depends upon just how the Congress enacted its laws, to what extent it went, whether it created a special board indicating what is right and what is wrong? That is the theory you advance?

Mr. Fitzpatrick: That's right, sir.

The Court: It goes overboard, so to speak, so as to indicate an intention on its part to pre-empt the field of enforcement, punishment, the infliction of the penal action; and the State, ipso facto, is out?

[fol. 87] Mr. Birns: Your Honor, rather than have the witness return to the Grand Jury, perhaps your Honor would fix a date for briefs. And I take it, your Honor would reserve decision?

The Court: Well, from a legal standpoint, is it necessary for the Court to keep these proceedings open before the Grand Jury, as far as this witness is concerned?

Mr. Birns: Well, all I can tell you, sir, is of the witness's refusal to answer, and that brings the issue before your Honor.

I take it, counsel will produce the witness whenever—if such an event requires his appearance?

Mr. Fitzpatrick: We shall, sir.

The Court: What date do you feel would be convenient? What date do both counsel feel would be a convenient one on which briefs may be exchanged?

Mr. Birns: A week?

Mr. Fitzpatrick: I would sooner make it two weeks.

Mr. Birns: I was going to say, your Honor, a week's time would be sufficient time for the People.

The Court: Well, I had a week in mind, also.

Exchange briefs within one week. And I will adjourn this for two weeks.

Mr. Fitzpatrick: If your Honor please, I am under rather a rough commitment. I have had my time extended by the United States Supreme Court, to file a brief on a petition down there, until the 15th. It's rather a chorish legal job, involving a terrific amount of legislative research. And I think I can finish it within this week. Would your Honor give me the next week to get this one up?

[fol. 88] Mr. Birns: Your Honor, I would like to accommodate counsel. Your Honor will remember that I extended the Grand Jury today. There are other witnesses before this Grand Jury. And without depreciating counsel's efforts, I would like to get this matter to a head as quickly as possible.

The Court: Briefs by May 10th. And we will adjourn the hearing, then, and continue the hearing, at which time I direct that the witness be present. Four o'clock.—Just a moment. I'll give you a date: we'll make it three-thirty, May 17th, in Part Four.

Mr. Fitzpatrick: Thank you for your courtesy.

The Court: That will be 3:30, May 17th.

Mr. Birns: Briefs will be exchanged on May 10th, your Honor?

The Court: May 10th.

Mr. Fitzpatrick: Thank you.

[fol. 89] IN COURT OF THE GENERAL SESSIONS OF THE COUNTY OF NEW YORK—PART FOUR

Proceedings on Order to Show Cause.

IN THE MATTER

of

MILTON KNAPP

HEARING ON AN APPLICATION OF THE DISTRICT ATTORNEY OF NEW YORK COUNTY, TO PUNISH MILTON KNAPP, A WITNESS, FOR CONTEMPT OF COURT—New York, May 17, 1956

APPEARANCES:

Harold Birns and Albert P. Loening, Assistant District Attorneys, for The People.

Bernard H. Fitzpatrick, Esq., 60 Wall Street, City, for Milton Knapp.

HEARING CONTINUED.

The Court: Gentlemen, I have not had a full opportunity to render a determination on the application of the District Attorney to punish the witness Milton Knapp for contempt. I have, however, reviewed the authorities applicable to the issues presented and I am more than satisfied that they establish, to my satisfaction at least at this time, the [fol. 90] legal fact that before a State police power may be deemed superseded or pre-emptied by Federal legislation there must be either an express statement in the Federal

law to that effect or an irresistible inference contained in the Federal legislation itself showing an intent on the part of Congress to supersede or to abrogate the State power to enforce a penal statute. I find in this case that there is nothing to remotely suggest such intention, either directly or inferentially.

Now, Milton Knapp, you have had the benefit at this time of the Court's informal expression of opinion without rendering at this moment a formal decision on the application of the District Attorney to punish you for contempt of court. You have already been given by the District Attorney and the Foreman of the Grand Jury maximum immunity from prosecution for crimes arising out of any disclosure on your part. I make no secret of the fact, and I am sure I am joined in this respect by the District Attorney, that your position is not an enviable one. It is, rather, a sympathetic one because you find yourself not a prospective defendant but a witness who must make disclosures which may incriminate other persons whom you apparently have no desire to hurt, and for reasons understood by the Court you, and you alone, will have to make up your mind, of course in conjunction with your lawyer's advice, as to what you want to do. The Grand Jury is going to convene on Tuesday. You will have an opportunity, if you so desire it, to go before that Grand Jury and answer all questions which are proper.

Your lawyer has indicated that he would like an opportunity of discussing this with you for the next ten or fifteen [fol. 91] minutes, after which he will give me an expression of opinion as to what your position will be on Tuesday.

Mr. Fitzpatrick, is there anything that you want to ask me at this time?

Mr. Fitzpatrick: No. I am frank to say that I had some further argumentation to address to the Court but——

The Court: I am not averse to receiving additional argument but I suggest that it be in the form of a supplemental memorandum to be submitted to me by tomorrow at 4:00 o'clock.

Mr. Fitzpatrick: A good part of it consists of a news story in The New York Times, which I think will be in my hands by 4:00 o'clock. I have ordered a reproduction from

the New York Public Library. The purpose of putting that in is to document my position on the possibility of conflict between State and Federal law in this field. As your Honor will see later cogently from this news story, there is the possibility of interference between the State and Federal domains here. If I might simply content myself with that, I can assure you that I will have it here at 4:00 o'clock. If I have to do more——

The Court: I shall read it, sir. In the meantime you confer with your client and you may use my robing-room, which is private, and if there is anything that you want to convey to the Court, I'll interrupt the trial for the purpose of receiving it. Otherwise for the purpose of the record the Court's determination on the motion of the District Attorney to punish for contempt will be rendered on Monday, May 21st, at 3:30 P. M.

Mr. Fitzpatrick: Thank you.

[fol. 92] Before: The Hon. Mitchell D. Schweitzer, a Judge of the Court of General Sessions.

New York, May 17th, 1956.

APPEARANCES:

For the People: Harold Birns, Esq., Assistant District Attorney.

For the Respondent: Bernard H. Fitzpatrick, Esq., 60 Wall Street, N. Y. C.

The Court Clerk: In the matter of the District Attorney of New York County to punish for contempt, Milton Knapp.

Mr. Fitzpatrick: If your Honor please, after consultation with Mr. Knapp we haven't been able to arrive at a final decision at this time to comply with the Court's direction, with due deference to the Court.

We still have the subject under advisement, and I shall be in a better position to inform the Court Monday as to the final attitude of the respondent Knapp.

The Court: For the purpose of this hearing, it will be continued Monday at 3:30 p. m., May 21st.

Do you want a new subpoena to issue?

Mr. Birns: Would your Honor direct the witness to reappear.

The Court: Yes, with a direction to the witness Milton Knapp to appear in Court on that day, at which time an opportunity will be given to the witness, if he is so advised and if he so desires to appear before the Third April 1956 [fol. 93] grand jury to answer questions heretofore ruled upon by this Court as proper,—in the light of the immunity granted to the witness under Section 2447 of the Penal Law.

I will state now that in the absence of some extraordinary compelling authority which I have as yet not uncovered, I will undoubtedly adhere to the law indicated in the record that the witness is required to answer those questions, and on his failure to do so I will not hesitate upon the application of the District Attorney to punish the witness for contempt of Court as provided for by Sections 750 and 751 of the Judiciary Law.

Mr. Fitzpatrick: There is one item I would like to inquire about, should the respondent desire Appellate review of your Honor's ruling would there be a stay in order to permit the institution of that?

The Court: I suggest you await the Court's ruling on Monday, particularly in view of the light of the fact that you have indicated you desire to submit some additional supplemental memoranda, and we will discuss it at that time and you can make your application accordingly.

Mr. Fitzpatrick: Very good, sir.

Mr. Birns: Thank you, your Honor.

[fol. 94] (Hearing on Application of District Attorney to Adjudge Milton Knapp, a Witness, in Contempt of Court, Continued).

(An off-the-record discussion is had at the bench, after which the following proceedings are had on the record):

Mr. Fitzpatrick: If your Honor please, at this time I should like to offer as an exhibit in this matter an article which was handed up to your Honor in connection with the argument on the law in this case concerning the Taft-

Hartley Act. It is an abstract from The New York Times of November 14, 1954. The article, which begins on Page 1, 6th column, continues on Page 68, 4th column, and is entitled "Dress Maker to Pay Union $250,000 Saved in South." I understand that the District Attorney has no objection to marking this as an exhibit.

Mr. Birns: I have no objection except to note on the record that I think its introduction is irrelevant and has no bearing upon this proceeding, but if counsel wants to press it, it is perfectly all right with me.

(Discussion at bench off the record.)

[fol. 95] Mr. Birns: Your Honor, I had indicated earlier that I would have no objection to the introduction of this exhibit, but upon reflection I've changed my position and I object to the introduction of this exhibit on the ground that it is irrelevant, incompetent and immaterial to this proceeding.

The Court: Objection sustained. You have an exception.

Mr. Fitzpatrick: Mr. Birns, I wish to summarize our position on the record.

Mr. Birns: I am sorry. I objected at that particular point.

The Court: Mr. Fitzpatrick, I understand that you desire at this point to summarize your position with respect to your opposition to the District Attorney's application to punish the witness for contempt of Court, is that correct?

Mr. Fitzpatrick: I do, sir.

The Court: You may make a statement for the record.

Mr. Fitzpatrick: In respect to the request of the District Attorney to sum up our position, I make the following four points:

First, the instant proceeding should have been prosecuted by order to show cause affidavit and trial of the resulting issues;

Second, the immunity conferred on the witness pursuant to Section 2447 is insufficiently broad in that it does not comprehend an immunity from prosecution under the applicable Federal statutes;

Third, that in view of the particular physical location of the particular Grand Jury before which this proceeding is progressing, the contempt is not committed in the sight [fol. 96] of the Court and hence must be prosecuted by order to show cause and plenary trial;

Fourth, even if every other portion of the proceedings were proper, the respondent contends that the Court and the Third April Grand Jury has no jurisdiction of the subject matter of the investigation by reason of the pre-emption of the field by the Taft-Hartley act and, in particular, Sections 7 and 302 of that enactment.

The Court: Do you want to say anything, sir?

Mr. Birns: Just off-hand, your Honor, the only purpose of the service of an order to show cause is to specify the particular counts which the petitioner or the District Attorney maintains is contemptuous. Your Honor, the record in this case will indicate that there was due notice given to the respondent and his counsel of all the refusals to answer which we maintain constitute the basis for the present application.

As far as the immunity provisions of 2447 not being broad enough, I think your Honor will recall that the cases hold that the State is only required to give immunity for those crimes over which the State itself has jurisdiction. Jurisdiction is complete and the State is not required to give immunity for crimes occurring in another or a foreign jurisdiction.

As far as the third position of the respondent is concerned, I think your Honor will find that the cases hold that the Court has summary jurisdiction to punish for contempt when a witness takes an unlawful position before a Grand Jury; and with respect to the fourth count, we have submitted a lengthy memorandum to your Honor on the question of pre-emption.

[fol. 97] The Court: I have indicated in an off-the-record discussion to counsel for the witness that I was initially of the impression that the Federal legislation here involved, referring to the Taft-Hartley law, does not contain any language specifically indicating an intent on the part of Congress to pre-empt this field of police power sought

to be exercised by the State of New York. The sections involved pertain to extortion and bribery in connection with labor relations and have long been regarded, traditionally at least, as within the police power of the State.

The questions which were submitted to the witness before the Grand Jury have been read into my record by the Grand Jury reporter, so it becomes part of my record. If I recall, I ruled that the questions were proper. So that there can be no mistake about the Court's attitude with respect to the question and the extent of immunity granted to this witness, I am going to ask the witness to rise. Milton Knapp, please rise.

(The witness stands up.)

The Grand Jury investigating this case will convene tomorrow at 2:30. There has been a list of questions heretofore submitted to you on April 25th, 1956, and you have refused to answer those questions. Do you recall the questions, sir?

Mr. Keating: Yes, your Honor.

The Court: I am asking the witness if he recalls the questions.

The Witness: I think I recall them.

The Court: Do you want them read back again, sir?

The Witness: No, sir; no, your Honor.

[fol. 98] The Court: The Court has ruled that they are proper. The Court has also ruled that the extent of the immunity granted by the Foreman of the Grand Jury is the limit of the immunity which the State of New York may grant yo , and without regard to the fact that your answers may tend to inspire Federal prosecution by virtue of the fact that there is Federal legislation covering the same field, I still rule that the immunity granted is all that can be given to you and you are required to answer those questions. Do you understand, sir?

Mr. Keating: The questions that the witness refused to answer—in fact, all of the questions that the witness refused to answer in the Grand Jury were on the witness' stated advice of counsel, on the grounds that his answers might tend to incriminate him.

The Court: And that already is reflected in the record.

Mr. Keating: Yes.

The Court: That is correct, Mr. Keating. I have held, in view of the fact that the Grand Jury pursuant to the provisions of Section 2447 has granted you immunity, that you are immune from prosecution with respect to your answers in the State of New York.

Mr. Keating: On the advice of counsel, and at your direction, your Honor, the witness continues to refuse to answer the questions on the same grounds, that his answers might tend to incriminate him.

The Court: And in spite of counsel's advice, I am now making a direction in open court to the witness to appear before the Grand Jury tomorrow and make responses to those questions.

[fol. 99] Mr. Keating: Is this for the purpose of an additional citation, your Honor, or in connection with the same proceeding?

The Court: This is a repetition, sir, of what has already been done at a prior hearing. I think I told the witness to go before the Grand Jury and answer those questions and he has failed to do so.

Now, do you want to resubpoena this witness for tomorrow, sir?

Mr. Birns: I take it that counsel will produce the witness tomorrow in this building?

Mr. Keating: I think——

The Court: I will direct the District Attorney to resubpoena the witness tomorrow.

Mr. Birns: Is your Honor concluding this hearing or is your Honor continuing this hearing until tomorrow morning?

The Court: No, I will conclude the hearing tomorrow after he appears before the Grand Jury again and I will make my decision after he has returned to this court from the Grand Jury room in the event of refusal there.

Mr. Birns: Then in that event would your Honor direct the witness to appear at the Grand Jury tomorrow?

The Court: I think the better practice would be for the District Attorney to resubpoena him right now.

Mr. Keating: Is it the position of your Honor that the District Attorney in issuing a subpoena is starting de novo in this case?

The Court: No, this is a continued proceeding.

Mr. Keating: Or is this a repetition of the proceeding that you have already had?

[fol. 100] The Court: We are carrying the proceeding.

Mr. Keating: Is this for the purpose of curing some defect in the record that we do not know about or that we have not been notified of?

Mr. Birns: I may submit to your Honor that the witness has been before the Grand Jury twice. He has been asked the same series of questions twice. He has maintained on each appearance his refusal to answer those questions on the ground that he feels that the answers he might give to those questions might tend to incriminate him. The People, based on that record before your Honor, have moved that this witness be punished for contempt in refusing to heed your Honor's admonition to return to the Grand Jury and answer those questions. Your Honor has already held that the questions were proper and that there was no lawful refusal.

Therefore, your Honor, I see no need to bring this witness before the Grand Jury. I say there is sufficient basis for your Honor now to conclude this hearing.

The Court: And if counsel represents that it would be futile to bring the witness before the Grand Jury for the purpose of making the same answers heretofore given by him, I can conclude the hearing tomorrow. I can conclude it right now if you want me to.

Mr. Keating: You will forgive me for detecting a mistake or otherwise some lingering doubt in your mind whether the proceeding up to the moment has been proper, because I see no other reason for a repetition of a proceeding that has already been conducted. Now, if the District Attorney by your order——

[fol. 101] The Court: I say this not because of any lingering doubt in my mind or because of a defect in any procedural aspect of this case. That's for the District Attorney to sustain. I am satisfied that even at this moment there has been a contempt committed in my presence sufficient to justify my acting under the provisions of the Judiciary Law. I was hoping that the witness and his counsel would realize that the direction propounded by the Court was

sound and that the witness would go before the Grand Jury and answer those questions.

Mr. Keating: For the purpose of making it clear that my statements on this question are sound and made in good faith, I would state for the record now that if the District Attorney does issue a subpoena requiring the presence of this witness before the Grand Jury in connection with a repetition of the proceeding in this case, I would advise him not to appear before the Grand Jury unless he were given access to the Grand Jury by some other means than through the portals of the District Attorney's office.

The Court: I think that's nonsense.

Mr. Keating: I think there is sound basis for that, your Honor.

The Court: In your initial argument, sir, you indicated that and I am making summary disposition of your argument right now. I think it is nonsense.

Mr. Birns: I don't think there is any need, your Honor, to bring this witness before the Grand Jury again. I say to your Honor, and I submit respectfully, sir, that the record in this case is replete and the People have good and sufficient [fol. 102] legal grounds for making application before your Honor to have the matter terminated.

The Court: Counsel for the witness has indicated that any future appearance before the Grand Jury would at best be a futile gesture, is that right?

Mr. Keating: I would say no more than this, that if the District Attorney subpoenas this witness before the Grand Jury, I would advise him not to appear before the Grand Jury unless he is permitted to go before the Grand Jury from this court building and not have to go through a private entrance to the District Attorney's office, which is not accessible to the general public, your Honor. No member of the general public can go into the District Attorney's Office as a matter of right. Now, I say that a Grand Jury should be open and accessible—not open but accessible to the public as a matter of right.

The reason I state that now is that that is one of four points we raise and have already made a part of the record; in fact, that would be part of the argument on which we base our point that the Grand Jury is not physically within

your presence, because one of the reasons it is not physically within your presence is that since this building was designed by the predecessor of Mr. Hogan, the Grand Jury has been physically within the structure of the District Attorney's Office; it occupies one of the floors in this building that is not used by anyone but the District Attorney's office and the Grand Jury. There are doors from the 9th floor of this building into the Grand Jury floor, but they are locked. The elevator operators on the first floor of this [fol. 103] General Sessions courthouse are instructed not to let anyone off at the 9th floor. The only way that anyone can get to the Grand Jury from the public is through the entrance to the District Attorney's office, which since the design of this building has been blocked by a police officer who is instructed not to let anyone into the building unless he states his business.

So that the District Attorney's office is not a public office. A courthouse is a public building. Grand Juries traditionally in this country have been situated either in a public building or in a building which is accessible to the public. We don't have to go any further than Kings County, the Bronx, Queens, Nassau, Suffolk, Westchester or any of the surrounding counties to find out that what I say is true.

Mr. Birns: Your Honor, I think this point has been argued on the first appearance before your Honor.

Mr. Keating: It was raised but it was not argued because you took the position, sir, in cutting short my argument that the only question before the Court was whether or not you should direct the witness to go back to the Grand Jury and answer certain questions.

The Court: You have indicated, sir, that such a direction would be futile.

Mr. Keating: I have not indicated anything on that point. The only thing that I have indicated is what I have just stated. I haven't gone beyond that.

The Court: I am satisfied that perhaps the District Attorney is right, that there is sufficient in the record for the Court to render a determination.

[fol. 104] Mr. Keating: I don't want anything I have said here today to be construed as contempt by this witness of any direction by you in terms of an order to the Dis-

trict Attorney to subpoena this witness to go before the Grand Jury tomorrow.

The Court: My only concern is for the witness. He is not a prospective defendant in this investigation, as I understand it.

Mr. Keating: According to the statement of the District Attorney, in the first instance, and in the second instance he could very well be a defendant under one of the two sections of the Penal Law cited by the District Attorney in moving this contempt proceeding.

Mr. Birns: Does counsel seriously contend that, in view of the fact that the Grand Jury has voted immunity to this witness?

The Court: If they wanted him as a defendant, they certainly would not have given him immunity.

Mr. Keating: The Grand Jury has not voted him immunity to prevent him from being a defendant not in a foreign prosecution but in a Federal jurisdiction, of which we are a part. A Federal jurisdiction is not a foreign jurisdiction.

Mr. Birns: I am certain that counsel will find the cases in this country to be replete with references to the courts of other States and Federal jurisdiction as being of foreign jurisdiction in a legal sense of the term.

Mr. Keating: I think another State could be referred to in some ways as a foreign jurisdiction, but the Federal government should never be referred to in this land as a "foreign" jurisdiction, legally or otherwise.

Mr. Birns: Your Honor, I don't want to get involved in [fol. 105] a case of international complexity. I am sticking to the law of the State of New York and I have made my motion.

The Court: I will render a decision at 12:00 o'clock tomorrow.

(Whereupon, further proceedings on this motion are adjourned to Tuesday, May 22, 1956, at 12 o'clock noon.)

Louis Frank, Official Stenographer.

New York, May 22, 1956.

Before: Hon. Mitchell D. Schweitzer, J.

(The respondent is present with his counsel, and the hearing is resumed, as follows):

The Court: Now, Mr. District Attorney, do you care to advance any further argument?

Mr. Birns: Your Honor, the People have submitted in [fol. 106] full every argument upon which we rely and I now renew my application that the witness be adjudged in contempt of Court.

The Court: Do you care to advance any further argument?

Mr. Fitzpatrick: I have no further arguments, your Honor, but simply in order to make sure we have a complete record, I would like to suggest to the Court that there is no evidence before it that at any time during the course of these proceedings was the foreman of the Grand Jury present.

The Court: Other than the fact that there is a presumption of regularity with respect to all proceedings on the part of the Grand Jury, have you any evidence to suggest that this presumption is not to be invoked?

MOTION TO DISMISS AND DENIAL THEREOF

Mr. Fitzpatrick: I have no evidence whatever as to the number of grand jurors present at any particular time, sir. I further suggest to the Court that there is an absence of a vote of the Grand Jury to cite the alleged contemner for contempt, and on that ground I move to dismiss.

The Court: Your motion, sir, is denied—or, rather, your application is to have the District Attorney's motion denied.

Mr. Fitzpatrick: That's right, sir. I further suggest that there is no proof in the record other than a statement of the District Attorney that any investigation was pending before the 3rd April Grand Jury at the time of the institution of these proceedings, and on that ground I move to dismiss.

The Court: Your application is denied.

Mr. Fitzpatrick: I have nothing further.

The Court: I indicated yesterday that the mere fact that [fol. 107] the Grand Jury voted this witness immunity shows conclusively to this Court that the District Attorney does not seek to make this witness a defendant. As a matter of fact, it could not make him a defendant in the light of that motion.

I think it is appropriate for the Court to pose the question once more to the witness.

Knapp, rise, please. (The witness stands up.) Do you still refuse to go before the Grand Jury to answer each and every question which you previously refused to answer and which I ruled is proper in every respect? Can you answer that "Yes" or "No", please?

The Witness: I refuse to answer on the ground that to do so might tend to incriminate me, on advice of counsel.

Sentence

The Court: I have heard argument fully presented, sir, and I rule that the witness is in contempt of Court, and I adjudge him accordingly. The sentence of the Court is that he be confined to the civil prison for a period of 30 days and fined the sum of $250. I direct that the District Attorney submit an appropriate mandate of commitment.

Colloquy

Mr. Keating: May I be heard on the question of sentence, sir?

The Court: You may.

Mr. Keating: In mitigation of the sentence, your Honor, I offer the following: The respondent is a partner in a firm doing business in the County of the Bronx and it has been for some time. He is engaged in interstate commerce. There is one other partner besides himself and he employs regularly ten employees. In connection with his business he purchases in excess of $50,000 worth of raw materials annually [fol. 108] and realizes in excess of $150,000 annually in sales, shipments and services performed by the partnership.

Mr. Knapp is a neighbor of mine. He is a married man with two children.

I urge in mitigation these additional facts: that he at no time during the proceedings in this court or in any of those in connection with his appearance before the Grand Jury has been insulting, disorderly, contumacious, flippant, recalcitrant, truculent, evasive or argumentative, and that he has been respectful at all times—respectful of the dignity of the Court, respectful of the dignity, the authority and function of the Grand Jury, respectful of the dignity, the power and function of the District Attorney's office.

On April 3rd, 1956, he received in his place of business a subpoena duces tecum commanding him to appear before a Grand Jury of this county on the following day with certain books and records. He appeared promptly, without seeking counsel, with the books and records demanded and, through no fault of his own, was prevented from appearing before the Grand Jury in answer to that mandate by the fact——

Mr. Birns: Your Honor, may I be heard?

The Court: No, I would prefer that counsel speak without interruption. You will be heard at the proper time.

Mr. Birns: All right.

Mr. Keating: —by the fact that when he arrived at the address specified in the Grand Jury subpoena duces tecum, to wit, 155 Leonard Street, which is also the address of the District Attorney's office, and when he got as far as the 9th floor of the District Attorney's office, on which the Grand Jury rooms are situated, and before he got to the [fol. 109] Grand Jury in performance of the command issued to him, he was diverted from the Grand Jury without his knowledge by act of some employee of the District Attorney's office.

I urge this as not a criticism of the District Attorney's office in this instance but as an explanation of every step with which this man has carried out any subpoenas, commands or orders of the court; that since then on every occasion when his presence was required before the Grand Jury or before this Court he appeared promptly; that his demeanor, his respect and his general manners have been consistent throughout; that the only basis offered for this summary conviction and punishment for criminal contempt is that on the advice of counsel and for the stated legal

reasons which appear in the record, he refused to answer certain questions put to him by an Assistant District Attorney in the Grand Jury and by the Foreman of the Grand Jury, and subsequently, after direction of this Court, the same questions in the Grand Jury.

I submit that the punishment you have meted out in this case does not fit whatever crime this man may be charged with. I take notice of the fact that the punishment you have meted out is the maximum punishment. I think that the record in this case is eloquent that this man's behavior, with the exception of his refusal to answer questions on the advice of counsel for substantial legal reasons which are yet to be decided, is not the type of behavior contemplated by the section under which he is convicted, nor is it the type of behavior which supports so extreme and, I sincerely believe, so cruel a punishment.

I strongly urge in all good faith that you reconsider, your Honor, for the reasons given and on the entire record, [fol. 110] and suspend on my application the execution of the jail sentence in this case.

The Court: I will hear you, sir.

Mr. Birns: Your Honor, when I stood a few minutes ago and asked to be heard I was about to take issue with the use of the word stated by counsel, that the witness was "prevented"—I think that was the word he used—from taking certain steps. I think, your Honor, upon reflection that this matter with respect to the initiation of this witness' appearance before the Grand Jury has been fully heard by you on prior occasions. I do wish, however, to be heard on the question of sentence.

It is not a simple thing in any instance to stand up and ask for the imposition of a jail sentence, particularly against a man as to whom no charge is being brought and who is not before your Honor as a defendant on an indictment. But as any other business man and, for that matter, as any other citizen in this community a duty devolves upon each and every member of this community to co-operate with law enforcement authorities in their sincere and earnest efforts to expose corruption and racketeering when such corruption and racketeering are believed to exist.

Your Honor, this witness by his refusal to answer the questions before the Grand Jury, which were ruled as proper in every respect, has thwarted the efforts of our Grand Jury to expose union racketeering in this county and I submit that his persistent refusal merits the imposition of a maximum sentence.

The Court: Mr. Keating, I am certainly not unmindful of the witness' predicament. It is indeed very unenviable and the duty of the Court at this time is not very pleasant. [fol. 111] I illustrated concretely my feelings by sentencing him to a civil jail rather than to a penal institution. Secondly, I indicated to you yesterday what the determination of the Court would be when I afforded you ample opportunity to prepare papers on appeal and perhaps a stay of execution could be secured in a higher court. That was the concrete evidence, I am sure, of the feeling of this Court.

I cannot, however, overlook the fact that the witness' refusal to answer questions and the background setting of the complete state of immunity offered by the District Attorney and the Grand Jury is calculated to frustrate the investigation of this Grand Jury. I am satisfied morally that his conduct is contumaceous and should be adjudged accordingly.

Therefore I adhere to my decision and I will file a memorandum opinion within the next day or two.

Mr. Keating: May I be heard now on the question of bail?

The Court: I don't plan to fix bail in this court. I gave you that time yesterday and I indicated to you yesterday that bail will have to be fixed in a higher court. That was my purpose in putting it over until today.

Mr. Keating: May I be heard on an application for reasons that I would be prepared to state, an application to have the respondent paroled in my custody pending the filing of the necessary papers in connection with the appeal?

The Court: Have you any objection, sir?

Mr. Birns: Yes, your Honor, we do. This matter has been before your Honor now since early in April, which is just about a little more than a month and three-quarters, [fol. 112] almost two months. I think there ought to be a concrete resolution of this matter now.

Mr. Keating: I have only one thing to urge upon your Honor in support of that application I have previously mentioned. In support of this application I urge all the arguments I made——

The Court: If I had fixed bail here, I would certainly parole him in your custody for a reasonable period of time in order for you to furnish an appropriate bond, but I am not fixing bail. Therefore your application to have him paroled at this time is denied.

Mr. Keating: I only want to be heard on one point in connection with the argument I have already made in my application for mitigation. The respondent is not only a neighbor but he is a dear personal friend of mine. We live only a block apart. If it is within the power of the Court, I see no reason why this request should not be made by me in good faith, I strongly urge your Honor, because of the nature of the case, to grant this request.

The Court: Sir, if your papers are ready, an appropriate application could be made to the proper forum for the fixing of bail. Your application is denied.

Mr. Fitzpatrick: If your Honor please, the appellate situation on a contempt proceeding such as this is a little bit confusing——

The Court: Do you want to discuss that on the record or off the record?

Mr. Fitzpatrick: I would prefer it off the record.

The Court: Step up, then, and we will discuss it off the record.

(Counsel on both sides confer at the bench, off the record.)

[fol. 114] IN COURT OF GENERAL SESSIONS

[Title omitted]

OPINION OF SCHWEITZER, J.

(Reported in N. Y. L. J., June 1, 1956, p. 8, Cols. 5-8).

Schweitzer, J.:

This is an application by the District Attorney pursuant to the Judiciary Law (§§750, 751) to have the respondent Milton Knapp adjudged in Contempt of Court for refusing to answer certain questions asked of him upon his appearance as a witness before the Third April, 1956 Grand Jury of this Court.

Among the proceedings pending before that Grand Jury was one entitled "People against John Doe, et al.", an inquiry designed to determine whether the crimes of Conspiracy (Penal Law, §580), Bribery of Labor Representatives (Penal Law, §380) and Extortion (Penal Law, §850) were being committed or had been committed in this county. In the course of that inquiry, Milton Knapp, one of two partners conducting business as Eagle Reel & Manufacturing Co., was subpoenaed to appear before the Grand Jury and to produce certain books and records. He appeared before the Grand Jury on April 23rd, 1956, was duly sworn and was asked the following question:

"Q. Now, who represented the union in these negotiations leading to a salary increase?"

The witness refused to answer that question, stating that he did so on the advice of his lawyer and on the ground [fol. 115] that it might tend to incriminate him.

The Grand Jury thereupon voted to grant the witness immunity, in accordance with the provisions of section 2447 of the Penal Law, and at the express request of the District Attorney, the foreman of the Grand Jury directed the witness to answer the question. The witness, however, again refused to answer on the same ground of possible self-incrimination.

Two days later, on April 25th, 1956, the witness reappeared before the Grand Jury and while under oath, was

asked a series of questions, each of which he refused to answer on the ground of possible self-incrimination, notwithstanding that the foreman of the Grand Jury, at the District Attorney's request, directed the witness to answer each question, thereby assuring him of the immunity provided for by section 2447 of the Penal Law.

The questions thus put to the witness, which he refused to answer, were as follows:

"Q. Mr. Knapp, do you know a man named Philip Goldberg?

Q. Mr. Knapp, do you know whether Philip Goldberg is an official of Local No. 239, International Brotherhood of Teamsters?

Q. Mr. Knapp, on or about October 28, 1955, did you give Philip Goldberg, a representative of Local No. 239, International Brotherhood of Teamsters, the sum of $500.00?

Q. Mr. Knapp, I show you this check marked Grand Jury Exhibit one of today's date in the sum of $500.00 and ask whether you recognize it.

[fol. 116] Q. Mr. Knapp, on or about October 28, 1955, did you go to the Public National Bank & Trust Company at 149th Street and Prospect Avenue and cash this check, Grand Jury Exhibit No. one, and receive from the bank the sum of $500.00?

Q. Mr. Knapp, on October 28, 1955, were you accompanied by Philip Goldberg, an official of Local No. 239, International Brotherhood of Teamsters, when you went to the Public National Bank & Trust Company located at 149th Street and Prospect Avenue?

Q. Mr. Knapp, I again show you Grand Jury Exhibit No. one of today's date and ask whether your handwriting appears on the face of that check?

Q. Mr. Knapp, I show you a stub book that appears to be a check stub book, and I ask you to examine this check stub book and tell me whether your handwriting appears on the space assigned to No. 2908, that is, the box?

Q. Mr. Knapp, I direct your attention to the box No. 2908, and I ask you to tell the Grand Jury what initial appears before the name, Goldberg?

Q. Mr. Knapp, I ask whether Grand Jury Exhibit No. two of today's date is in fact a stub book used by the Eagle Reel and Manufacturing Co.?

Q. Mr. Knapp, when was the last time you spoke to Philip Goldberg?

Q. Do you know a man named Sam Goldstein?

Q. Isn't it a fact that Sam Goldstein is an official of Local No. 239, International Brotherhood of Teamsters?

[fol. 117] Q. Did you ever pay or give any sum of money to Sam Goldstein?"

The District Attorney and the foreman thereupon applied to this Court to direct the witness to answer the foregoing questions. Following a hearing at which the witness was represented by counsel, this Court ruled that the questions were proper in every respect and directed the witness to return to the Grand Jury room and to answer each of the questions.

On April 27th, 1956, the witness reappeared before the Grand Jury, each of the questions was again read to him, and he persisted in his refusal to answer each of those questions on the same stated ground of possible self-incrimination.

Thereupon, on April 30th, 1956, the present application was made to this Court for an order adjudging the witness, Milton Knapp, in Contempt of Court. A further hearing was held at which the witness was again represented by counsel. At this hearing, the witness raised the objection that the entire investigation by the Grand Jury was beyond its jurisdiction, the claim advanced being that the business in which the witness was engaged was an industry affecting interstate commerce, and that section 302 of the federal Labor Management Relations Act, 1947 (the so-called Taft-Hartley Act), 29 U. S. C. §186, had completely preempted the subject matter of payments made by an employer to a representative of employees in any industry affecting interstate commerce, and thereby rendered inoperative any state legislation on the same subject matter.

Section 380 of the Penal Law is entitled "Bribery of Labor Representatives", and makes it a misdemeanor for

[fol. 118] any duly appointed representative of a labor organization to solicit, accept or agree to accept a bribe from any person for the purpose of influencing his "acts, decisions, or other duties as such representative" or for the purpose of inducing him to refrain from causing or preventing "a strike or work stoppage or any form of injury to any business"; and it also makes guilty of a misdemeanor any person who gives or offers a bribe to such a representative for any such purpose. (See *People* v. *Cilento,* 1 A. D. 2d 206, 207, 208.)

Section 302 of the Taft-Hartley Act (29 U. S. C. §186), on which respondent witness here relies, makes it a misdemeanor, subject to certain stated exceptions, for an employer "to pay or deliver, or agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce", and likewise makes it a misdemeanor for any such representative "to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value". The section has been interpreted by the United States Supreme Court as creating a criminal offense of the nature of *malum prohibitum,* and as outlawing "all payments, with stated exceptions, between employer and representative" (*United States* v. *Ryan,* 76 S. Ct. 400).

It has long been settled that "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal governments and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each" (*California* v. *Zook,* 336 U. S. 725, 731, quoting from *United States* v. *Marigold,* [fol. 119] 9 How. 560, 569; and other cases there cited).

The question, in essence, where the federal government has legislated on a subject within its jurisdiction and there is also state legislation affecting the same subject, is whether Congress intended to make its jurisdiction exclusive, thereby displacing the state statutes. It is established that "normally congressional purpose to displace local laws must be clearly manifested" (*California* v. *Zook, supra,* 336 U. S. at 733, and cases there cited). And where the

claim is that the state legislation conflicts with the federal enactment, "it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation" (*Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148, 156).

One of the factors which has been given great weight in determining that Congressional action was not intended to override state legislation in the same area, has been that the state laws, if that be the case, are aimed at evils within the scope of the state's traditional police powers. Thus, in *Fox* v. *Ohio,* 5 How. 410, it was held that the act of passing counterfeit money, though a crime under the federal Criminal Code, could also be punished by the state as the perpetration of a fraud on the person to whom the spurious money was passed (see *Commonwealth of Pennsylvania* v. *Nelson,* 76 S. Ct. 477, 479, decided April 2nd, 1956). And in *Gilbert* v. *Minnesota,* 254 U. S. 325, a state enactment which prescribed interference with, or discouragement of, the enlistment of men in the military or naval service of the United States or of the state, was upheld as a valid "local police measure", notwithstanding existing federal legislation on the same subject (see *Commonwealth of Pennsyl-*
[fol. 120] *vania* v. *Nelson, supra,* 76 S. Ct. at 479).

It has similarly been observed that the punishment of such acts as extortion, fraud and violence, among others, is within the ambit of the state's "usual police powers", which will not be deemed displaced by regulatory federal legislation in the field in which such acts are committted, in the absence of an express manifestation of such a Congressional purpose (see *California* v. *Zook, supra,* 336 U. S. at 732, 734-5).

"It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested." (*Reid* v. *Colorado,* 187 U. S. 137, 148; see *Kelly* v. *Washington,* 302 U. S. 1, 11.)

Extortion (Penal Law, §850 *et seq.*) and bribery in connection with labor relations (Penal Law, §380) have long been the subject of regulation in this state. They are certainly within the ambit of the historic and traditional

police power of the state. There is nothing in the language of the federal statute here involved or in its legislative history to suggest that Congress intended to foreclose the states from continuing to protect their inhabitants from such evils. On the contrary, such sources of Congressional intent as are available indicate that Congress did not propose to invalidate existing state legislation on such subjects or to preclude state action with regard thereto.

Respondent relies on a series of Supreme Court decisions in the field of labor relations which have held that the broad powers conferred upon the National Labor Relations Board by the Taft-Hartley Act for the regulation of [fol. 121] unfair labor practices, operate to preclude the states from exercising jurisdiction over such practices, either in the administrative or in the judicial sphere, where the acts complained of do not reach the stage of violence or unlawful coercion (*Garner* v. *Teamsters, Chauffeurs & Helpers, etc.*, 346 U. S. 485; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468; *United Mine Workers* v. *Arkansas Oak Flooring Co.*, U. S. , 24 L. W. 4197, decided April 23rd, 1956). In *Garner* v. *Teamsters, Chauffeurs & Helpers, etc., supra*, the Supreme Court, however, emphasized (346 U. S. at 488):

> "The national Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.
>
> This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is 'governable by the State or it is entirely ungoverned.' In such cases we have declined to find an implied exclusion of state powers. *International Union* v. *Wisconsin Board*, 336 U. S. 245, 254. Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. *We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways'. Allen-*

Bradley Local v. *Wisconsin Board*, 315 U. S. 740, 749." (Emphasis supplied.)

[fol. 122] The Supreme Court has thus held that applicable state remedies were not superseded by the jurisdiction reposed in the National Labor Relations Board, where the acts in question involved mass picketing, threats of violence and obstruction of public ways (*Allen-Bradley Local* v. *Wisconsin Board*, 315 U. S. 740) or constituted unlawful coercive tactics (*Auto Workers* v. *Wis. Board*, 336 U. S. 245). In the latter case, the Court declared (336 U. S. at 252-253):

> "Congress has not seen fit in either of these Acts [the Taft-Hartley Act and the earlier Wagner Act] to declare either a general policy or to state specific rules as to their effects on state regulation of various phases of labor relations over which the several states traditionally have exercised control. * * * However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Relations Act of 1947, that 'Congress designedly left open an area for state control' and that the 'intention of Congress to exclude States from exercising their police power must be clearly manifested.' *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 750, 749. * * *"

Similarly, in *United Workers* v. *Laburnum Corp.*, 347 U. S. 656, it was held that the Taft-Hartley Act did not preclude the maintenance of a common law tort action in a state court for damages based upon tortious conduct of certain labor organizations, involving threats of violence and intimidation, notwithstanding that such acts also con- [fol. 123] stituted unfair labor practices as defined by the federal statute. In its opinion in that case, the Court quoted from the Senate Report (No. 105, 80th Cong., 1st Sess. 50) preceding the adoption of the Taft-Hartley Act, as indicative of the design of that Act not to supersede state regulation where the acts to be regulated by the federal Act were also "illegal under State law" (347 U. S. at 668).

The Court also quoted from a statement made by Senator Taft on the floor of the Senate that "There is no reason in the world why there should not be two remedies for an act of that kind" (347 U. S. at 668-9).

There is no claim or suggestion that the acts here under investigation by the Grand Jury constitute "unfair labor practices" subject to the exclusive jurisdiction of the National Labor Relations Board. Decisions such as *Garner* v. *Teamsters, Chauffeurs & Helpers, etc.* and *Weber* v. *Anheuser-Busch, Inc., supra,* are therefore inapplicable. Rather, the situation here presented is more closely analogous to the other cases noted above, in which the Supreme Court held that acts of violence, intimidation, disorder and tortious injury remain subject to state regulation for the safeguarding of local interests, notwithstanding the enactment of the Taft-Hartley Act.

Respondent also cites the recent decision of the Supreme Court in *Commonwealth of Pennsylvania* v. *Nelson, supra,* 76 S. Ct. 477, where a Pennsylvania sedition statute was held to have been superseded by the federal anti-sedition legislation. In reaching that conclusion, however, the Court emphasized that the federal legislation touched "a field in which the federal interest is so dominant that the federal [fol. 124] system must be assumed to preclude enforcement of state laws on the same subject" (p. 481), and that the "enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program" (p. 482). The Court further pointed out that sedition was "not a local offense" but rather "a crime against the Nation" (p. 482). It is significant that the Court further noted the limits of its decision in the following words (p. 479):

> "Neither does it limit the right of the State to protect itself at any time against sabotage or attempted violence of all kinds. Nor does it prevent the State from prosecuting where the same act constitutes both a federal offense and a state offense under the police power * * *."

In the present case there is no doubt that the crimes of Bribery of Labor Representatives, Extortion and Con-

spiracy, which are the subject of the pending Grand Jury investigation, constitute local offenses within the reach of the state's traditional police powers. The mere fact that section 302 of the Taft-Hartley Act in a measure parallels the state statute governing one of these crimes, i.e., that of Bribery of Labor Representatives (Penal Law, §380), does not operate to invalidate the state enactment (*California* v. *Zook, supra,* 336 U. S. at 730). The pertinent decisions make it clear that Congress will not be taken to have intended to debar the state from safeguarding its citizenry from pernicious evils of this kind. No conflict has been shown to exist, or is to be found, between the local statutes here involved and either the terms or the policy of the fed-
[fol. 125] eral legislation. There is consequently no basis for holding that the state is without jurisdiction of these offenses, or that the Grand Jury lacks the power to conduct an investigation in relation thereto.

As a further justification for his refusal to answer the questions asked by the Grand Jury, respondent urges the fact that he has not been granted immunity thereby from possible Federal prosecution.

In this connection, it need only be observed that the immunity granted respondent (Penal Law, §2447) was the maximum which could be granted by this State (*People* v. *Breslin,* 306 N. Y. 294, *cert.* denied, 347 U. S. 1014). Consequently, the requirements of both the State and Federal Constitutions have been satisfied [*Brown* v. *Walker,* 161 U. S. 591; *Jack* v. *Kansas,* 194 U. S. 372; *Feldman* v. *U. S.,* 322 U. S. 487, 493; *People* v. *Breslin, supra; Dunham* v. *Ottinger,* 243 N. Y. 423, 438; *Matter of Herlands (Carchietta),* 204 Misc. 373].

Respondent finally contends that this Court may not punish him summarily, since the Grand Jury is not in the immediate view and presence thereof, and that the proceedings must be initiated by an order to show cause.

In answering this contention, we need not consider whether the original refusal to answer the questions put by Grand Jury was a contempt committed in the constructive presence of this Court, since this Court heard sworn testimony by the Grand Jury stenographer both as to this original refusal and as to the subsequent refusal after a specific direction by this Court. Furthermore, respondent,

in open court, has stated his refusal to answer the questions, [fol. 126] thereby reaffirming the position taken before the Grand Jury. Under the circumstances, respondent's contempt was committed in the view and presence of this Court (*People ex rel. Hackley* v. *Kelly*, 24 N. Y. 74). No further proof is necessary (*Douglas* v. *Adel*, 269 N. Y. 144, 146-7).

Even were it otherwise, it would be an idle gesture to serve respondent with an order to show cause. Respondent has been fully advised of the specifications upon which this application is based and has been represented by counsel at all stages of the proceedings herein. Respondent and counsel have appeared in this proceeding on five different days, over the period of a month. There have been hearings, at which respondent vigorously urged defenses of law, and made no attempt to controvert any of the material facts herein. Briefs have been submitted by both parties. Consequently, the statutory requirements (Judiciary Law, §751) applicable to criminal contempts not committed in the view and presence of the court have been satisfied (*Spector* v. *Allen*, 281 N. Y. 251).

It is therefore my conclusion that respondent witness was not justified in refusing to answer the questions put to him, and that the application to punish him for contempt must be granted.

I sentence the defendant to the term of thirty (30) days in Civil Prison and fine him the sum of Two Hundred and Fifty Dollars ($250).

/s/ Mitchell D. Schweitzer, Judge, Court of General Sessions.

Dated New York, May 22, 1956.

[fol. 127] IN SUPREME COURT OF NEW YORK

OPINION OF MARKOWITZ, J.

(N. Y. L. J., June 28, 1956, pg. 1, Col. 6.)

Knapp v. Schweitzer—This is an application, pursuant to article 78 of the Civil Practice Act, wherein petitioner seeks a review of the judgment of the Court of General Sessions, New York County, which held him in contempt of court pursuant to sections 750 and 751 of the Judiciary

Law. Petitioner was sentenced to thirty days' imprisonment in the civil jail and to pay a fine of $250. The contempt adjudication is predicated upon petitioner's repeated refusal to answer certain questions asked of him, before the Third April Grand Jury of this county. Petitioner had been accorded immunity pursuant to Penal Law section 2447, and directed to answer by the said court. While the instant application is made under article 78 of the Civil Practice Act, by express statutory provision (Judiciary Law, section 752), petitioner also seeks relief in the nature of prohibition against both the judge (Schweitzer, J.) who committed him, and the District Attorney of New York County to prohibit any further proceedings in respect to the refusal to answer the questions put to him. The contentions of the relator were adequately and completely answered in the learned opinion of Judge Mitchell D. Schweitzer. The application is without merit. Accordingly, the petition is denied in all respects and is dismissed. Settle order.

[fol. 131] At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 27th day of November, 1956.

PRESENT:

Hon. Bernard Botein, Justice Presiding, Hon. Benjamin J. Rabin, Hon. Joseph A. Cox, Hon. Martin M. Frank, Hon. Francis Bergan, Justices,

10365

IN THE MATTER

of

The Application of MILTON KNAPP for an order under Artiele 78 of the Civil Practice Act, Petitioner-Appellant,

against

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions and FRANK S. HOGAN, District Attorney of the County of New York, Respondents.

ORDER OF AFFIRMANCE, APPEALED FROM—November 27, 1956

An appeal having been taken to this court by the petitioner-appellant from an order of the Supreme Court, New [fol. 132] York County, entered on or about the 3rd day of July, 1956, dismissing petitioner's petition herein,

And said appeal having been argued by Mr. Bernard H. Fitzpatrick of counsel for the appellant, and by Mr. Albert P. Loening, Jr., of counsel for the respondents; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same hereby is affirmed without costs.

Enter:

George T. Campbell, Clerk.

[fol. 133] IN SUPREME COURT, APPELLATE DIVISION—
FIRST DEPARTMENT

September 1956.

Bernard Botein, J. P., Benjamin J. Rabin, Joseph A. Cox, Martin M. Frank, Francis Bergan, JJ.

10365

IN THE MATTER

of

The Application of MILTON KNAPP for an order under Article 78 of the Civil Practice Act, Petitioner-Appellant,

v.

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions and FRANK S. HOGAN, District Attorney of the County of New York, Respondents.

Appeal from order of the Supreme Court at Special Term (Markowitz, J.) entered July 3, 1956 in the New York County Clerk's office dismissing petition to review judgment of the Court of General Sessions, New York County, adjudging petitioner in contempt, sentencing him to jail and

payment of fine, for failure to answer questions before [fol. 134] Grand Jury on assertion of claim of privilege against self incrimination.

Bernard H. Fitzpatrick, of counsel (William J. Keating with him on the brief; William J. Keating and Butler, Bennett & Fitzpatrick, attorneys) for Appellant.

Albert P. Loening, Jr., Assistant District Attorney, of counsel (Charles W. Manning, Assistant District Attorney, with him on the brief; Frank S. Hogan, District Attorney, attorney) for Respondents.

OPINION

Bergan, J.:

Petitioner Milton Knapp has been committed for contempt by the Court of General Sessions for failure to answer questions before the New York County Grand Jury. He is a co-partner of Eagle Reel and Manufacturing Co., which is engaged in interstate commerce. The employees of the firm are organized by Local 239 of the International Brotherhood of Teamsters.

The subject on which the Grand Jury inquiry was being prosecuted and in which the testimony of petitioner was sought to be elicited was whether the crime of bribing labor representatives, under Penal Law, §380; of conspiracy, under §580; and of extortion, under §850, had been committed.

When called before the Grand Jury on April 23, 1956, petitioner asserted his privilege against self-incrimination. This privilege is preserved by the New York Constitution (Article I, §6). He was required, nevertheless by the Grand [fol. 135] Jury on a later date to answer the questions directed to him and upon this mandate he acquired, and was expressly given by the Grand Jury, an immunity co-extensive with the operational effect of New York law. (Penal Law, §2447; Cf. *People* v. *De Feo*, 308 N. Y. 595).

Petitioner thereupon asserted that although the statute regulating immunity in New York would protect him against prosecution in this State based on his testimony, answers elicited under compulsion of New York authority would in-

criminate him under Federal law which makes unlawful, among other things, the payment of money by an employer to any representative of his employees in an industry affecting commerce (29 U. S. C., §186). He thereupon persisted in refusal to answer the questions before the Grand Jury and was held in contempt by the Court of General Sessions.

This is an Article 78 proceeding against the judge presiding at the General Sessions at which petitioner was held in contempt and against the District Attorney of New York County in the nature of prohibition. The amended answer pleads matters largely in the nature of defenses of law; and a reply served by the petitioner contains an affirmative pleading that the "reality of petitioner's danger of self-incrimination" under provisions of the Federal Labor Management Relations Act is based on the public announcement of the United States Attorney of the Southern District of New York of an intention "to cooperate with the District Attorney of New York County in the prosecution of criminal cases in the field of the subject matter out of which petitioner's commitment arose". This reply further alleges [fol. 136] that the respondent District Attorney "intends to cooperate with" the United States Attorney "in the prosecution of such criminal cases in the courts of the United States".

Since the court at Special Term disposed of these issues summarily without trial and by a dismissal of the petition which carried with it a dismissal of the reply as being insufficient, we are required to accept as true upon this appeal the factual allegations of the reply in respect of the cooperation between Federal and State prosecuting officers in this area of criminal responsibility occupied both by Federal and State governments within their respective statutory enactments (*Matter of Doherty* v. *McElligott*, 258 App. Div. 257, 258, 260).

We therefore are required to begin the consideration of the question raised by the petitioner by accepting as a demonstrated fact in the record before us the actual cooperative policy between the appropriate Federal and State authorities in prosecuting crimes arising from acts made criminal both by Congress and by the New York Legislature and concerning which the petitioner's testimony is sought to be compelled.

If the literal logic of some of the decided cases be carried to the ultimate it would seemingly be quite possible for a State prosecuting authority to obtain a direction to compel a witness to incriminate himself upon granting a State immunity and for this to be followed by a Federal prosecution for the act disclosed under compulsion; and, indeed, with the compelled testimony used in support of the Federal charge.

But the full implications of such a concave view of con-
[fol. 137] stitutional privilege have not been faced, and the cases which have called up discussion of the question have not required that this ultimate question be decided. In the margin of decision the view sometimes has been expressed that the possibility of Federal prosecution upon the compelled State disclosure has been remote or unlikely.

The complex and delicately adjusted balance of sovereignties between Federal and State governments presupposes a related measure of responsibility for each. Each is bound by identical constitutional restraints. The State has its function under the United States Constitution as well as the Federal government; and they have extremely close and continuous relations with each other. We are not here treating of sovereign strangers but of inseparable sovereigns of the same fibre and substance.

The cases of different sovereign jurisdictions decided under English law and sometimes cited in American cases on this subject, seem to us to have only illustrative or peripheral relation to the precise American constitutional problem of what ought to happen when a State compels criminal self-incrimination in an area of actual exposure of the witness to prosecution under effective and operative Federal criminal law. Examples of the often cited English cases which hold the British court will not protect witnesses against violation of the law of "another country" are *King of the Two Sicilies* v. *Willcox* (7 State Trials, N. S. 1050, 1068; *Queen* v. *Boyes* (1 B. & S. 311, 330). (*Cf. United States* v. *Murdock*, 284 U. S. 141, 149).

The States of the United States certainly are not "other countries" in relation to the Federal government. Federal-
[fol. 138] ism as we have developed it does not exist in airtight compartments of sovereign power; both general

and state governments spread together over the same land and embrace the same people.

The whole tenor of constitutional law as developed in the courts of the United States suggests that a witness compelled by a State to testify against himself in a criminal case also affected by Federal law, where the Federal prosecuting authorities have knowledge of the State proceedings, and especially where they cooperate in those proceedings, will be protected fully by the judicial power of the United States against the adverse effects of such compulsion on subsequent Federal prosecution.

The usual rule is, of course, that the United States will not deem itself bound not to prosecute because of unilateral exercise of compulsion to self-incrimination by a State; and this in part on the ground that the general government will not be restrained in its policy by local action taken by a State government. The principle is illustrated in *Feldman* v. *United States* (322 U. S. 487) in which Mr. Justice Frankfurter noted that "a State cannot by operating within its constitutional powers restrict the operations of the National Government within its sphere" (p. 490). See also *Jack* v. *Kansas* (199 U. S. 372, 380).

But in some of the decisions on the subject which preceded *Feldman* v. *United States,* the court regarded the risk of Federal prosecution arising from State compulsion as distant and remote; and this conception is in the overtone of the opinions as suggesting by mere remoteness a safeguard enough for the case actually presented. In *Jack* v. *Kansas,* [fol. 139] for example, in dealing with an argument in objection to a State immunity statute that it did not protect against Federal prosecution in the same field, Mr. Justice Peckham agreed with the Supreme Court of Kansas that the danger that Federal prosecution "would ever take place" was "so unsubstantial and remote" that it was unnecessary, and of course not possible, for the State to provide against it.

"We do not believe that in such case there is any real danger of a Federal prosecution, or that such evidence would be availed of by the government for such purpose" (p. 382). In dealing with the inability of the State to prevent prosecution of the same party for a Federal violation

the court interpolated the comment "if it could be imagined that such prosecution would be instituted in such circumstances" (p. 380).

In dealing with its own immunity statutes, the United States has been able to give a simple and summary answer to the assertion that Federal immunity does not safeguard the witness against State prosecution based on his testimony. The supremacy of the general government is asserted. (*United States* v. *Murdock, supra; Hale* v. *Henkel,* 201 U. S. 43). The converse problem posed by the inability of a State to assure immunity against Federal prosecution is at once more subtle and more difficult of adequate solution which would seem to hang some measure of cooperation, administrative or judicial, between the two governments.

The opinion in *Feldman* v. *United States* makes it clear that the complete non-participation of Federal authorities in the private proceedings in the New York State court which elicited the incriminating testimony was an important [fol. 140] element which led to the permitted use of such testimony in the United States court.

If a Federal agency "were to use a State court as an instrument for compelling disclosures for federal purposes" the policy of the courts of the United States would be to protect the witness "against such an evasive disregard of the privilege against self-incrimination" (p. 494). Moreover, the court was of opinion that there was "no complicity" between private parties obtaining the incriminatory testimony in the State court "and federal law-enforcing officers" (p. 492).

Although some of the restraints imposed by the first eight amendments of the Constitution of the United States on the Federal government have now an impact upon the States by virtue of the reflected due process and equal protection requirements of the Fourteenth Amendment (*Board of Education* v. *Barnette* (319 U. S. 624)), it is an interesting commentary on constitutional development in the United States that the prohibition on self-incrimination in the Fifth Amendment is not by mirrored force of the Fourteenth Amendment held to be binding on the States. (*Adamson* v. *California,* 332 U. S. 46; *Palko* v. *Connecticut,* 302 U. S. 31; *Twining* v. *New Jersey,* 211 U. S. 78); al-

though the historically closely related protection against the effect of a confession elicited by extrajudicial force is protected by the Fourteenth Amendment (*Lee* v. *Mississippi*, 332 U. S. 742).

But although the Fourteenth Amendment also does not operate to prevent, for example, unreasonable searches and seizures by a State government (*Wolf* v. *Colorado*, 338 U. S. 25) nevertheless the active participation of officers of the United States in a state-initiated search and seizure [fol. 141] will effectively bar the reception of such evidence in the Federal courts within the operative effect of the United States Constitution (*Byars* v. *United States*, 273 U. S. 28).

"We cannot avoid the conclusion," said Mr. Justice Sutherland, "that the participation of the agent in the search was under color of his federal office and that the search in substance and effect was a joint operation of local and federal officers" (p. 33). The Federal government has the right to use evidence improperly seized by State officers "operating entirely on their own account," but the "rule is otherwise when the Federal government * * * participates" in the wrongful seizure.

It is not difficult from this to analogize joint cooperation of State and Federal authorities, or the participation of Federal authorities by cooperation with State officers, in elicitation of compulsory incriminating testimony so that it will result in the protection of the Fifth Amendment in a subsequent criminal prosecution based on such testimony. In *Burdeau* v. *McDowell* (256 U. S. 465) which considered the effect of both the Fourth and Fifth Amendments on papers seized, the court was careful to note that "no official of the Federal government had anything to do with" the taking of the property in question (p. 475).

While the restraint of the Fifth Amendment does not directly touch our judicial processes, we in New York have our own constitutional provision in the same spirit and in the same language (N. Y. Const., Art. I, §6), and we are bound as far as our strength permits to give it effect.

We are not able to assure protection against a Federal [fol. 142] prosecution using the self-incriminatory testimony we compel against objection and for which we give a State

immunity, and the validity of our immunity statute does not depend on our ability to secure the witness against Federal prosecution (*Dunham* v. *Ottinger*, 243 N. Y. 423).

But we cannot in fair compliance with our own Constitution remain insensible to the actual dangers of non-immunized compulsory incrimination in the United States courts where we compel testimony in the ever-broadening areas and in subjects affected by the criminal laws of both governments. And while we can exercise no control over Federal practice, we can exercise a judicial supervision over State enforcement officers.

A State prosecuting officer investigating an area in which the criminal laws of both the Federal and State governments operate together, and requiring immunized testimony in the development of his case, could himself give adequacy to State constitutional safeguards by tendering cooperation with the appropriate United States attorney.

If the cooperation were accepted by the Federal government we have no doubt that within *Feldman* v. *United States, Byars* v. *United States* and *Burdeau* v. *McDowell* (*supra*), the courts of the United States would afford adequate safeguards to the witness. Such safeguards would strengthen the confidence with which a State might undertake to compel self-incriminating testimony where duality of criminal law might be operative; and it would tend to assure the adequacy of State constitutional guaranties binding alike on State prosecutors and State courts.

When to seek such cooperation and when to proceed without it would, in the nature of things, rest in the conscience [fol. 143] and judgment of the district attorney, who would act in consonance with the spirit of the New York Constitution. The solution, at bottom, lies in cooperation in good faith between the two governments and their judicial and prosecuting establishments, both of which live in quite the same tradition.

Assuming, as we do in this case, from the undisputed allegation of the public announcement of cooperation by the United States attorney with the district attorney, and the undisputed allegation of intention by the district attorney to cooperate with the United States attorney, that the fact of cooperation is true and that the instant inquiry is em-

placed within it, adequate protection under the Federal decisions would have inured to the petitioner.

The United States courts would not, of course, accept these pleadings as conclusive; but if Federal judicial inquiry disclosed the facts to be as they are here pleaded, the immunity that petitioner would gain under New York law would seem to extend to the residual risk of Federal prosecution. On the other hand, if it is not shown that the alleged cooperation and intent to cooperate did in fact exist, it would not appear that there is a real and substantial danger that the testimony compelled by the state will be used in a subsequent Federal prosecution.

The order should be affirmed without costs.

All concur.

[fol. 145] IN COURT OF APPEALS OF NEW YORK

PRESENT:

Hon. Albert Conway, Chief Judge, presiding.

Mo. No. 18

In the Matter of
the Application of MILTON KNAPP, Appellant,
for an Order &c.

v.

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions, & ano., &c., Respondents.

ORDER STAYING ENFORCEMENT OF COMMITMENT OF COURT OF GENERAL SESSIONS—January 10, 1957

A motion having heretofore been made herein upon the part of the appellant for a stay and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted and, pending the hearing and determination of the appeal herein, the respondents be stayed from enforcing

against the appellant the commitment of the Court of General Sessions dated May 22, 1956, and case set down for argument during the third week of the January, 1957, session of this Court.

Gearon Kimball, Deputy Clerk.

[fol. 146] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 148] IN THE COURT OF APPEALS OF NEW YORK

No. 363.

In the Matter of the
Application of MILTON KNAPP, Appellant,
for an Order &c.,

v.

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions, & ano., &c., Respondents.

REMITTITUR—March 8, 1957

Be it Remembered, That on the 12th day of December in the year of our Lord one thousand nine hundred and fifty-six, Milton Knapp, the appellant in this cause, came here unto the Court of Appeals, by William J. Keating, and Butler, Bennett, Fitzpatrick & DeSio, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Mitchell D. Schweitzer, Judge of the Court of General Sessions, & ano., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 149] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Bernard H. Fitzpatrick, of

counsel for the appellant, and by Mr. Albert P. Loening, Jr., of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

[fol. 150] Therefore, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 151] In Court of Appeals of New York

Present:

Hon. Albert Conway, Chief Judge, presiding.

Mo. No. 154

In the Matter of
the Application of Milton Knapp, Appellant,
for an Order &c.

v.

Mitchell D. Schweitzer, Judge of the Court of General Sessions, & ano., &c., Respondents.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted. Return of remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon by the Court of Appeals questions under the Constitution of the United States, as follows: "1. In the course of an investigation by the Third April Grand Jury of New York County under Penal Law, Sections 380, 580 and 850 dealing with bribery of labor union representatives, conspiracy and extortion, appellant, an employer engaged in interstate commerce, declined to answer questions directed to the ascertainment of whether he had paid money to certain named officials of a labor union, Local 239, International Brotherhood of Teamsters, on the ground that the answers would tend to incriminate him, citing particularly his peril under a Federal statute, Taft-Hartley Act, Section 302, 29 USC 186 regulating under penal sanction, payments to union representatives; and appellant was thereupon convicted of a contempt of the Court of General Sessions of said County against his contention that since the source of the peril of prosecution was Federal, he was privileged to decline to answer by virtue of the Fifth Amendment to the United [fol. 152] States Constitution which binds the State Court Grand Jury through the Supremacy clause Article VI, Clause 2 as well as through the Privileges and Immunities Clause of the Fourteenth Amendment. This Court decided the stated contention adversely to appellant. 2. In the course of an investigation by the Third April Grand Jury of New York County proceeding under Penal Law, Sections 380, 580 and 850 dealing with bribery of labor union representatives, conspiracy and extortion, appellant, an employer engaged in interstate commerce, declined to answer questions directed

to the ascertainment of whether he had paid money to certain named officials of a labor union, Local 239, International Brotherhood of Teamsters; and appellant was thereupon convicted of a contempt of the Court of General Sessions of said County against his contention that Taft-Hartley Act, Section 302, 29 USC 186, regulating payments by employers to labor union representatives, by preempting the field of regulations of such payments had rendered Penal Law Sections 380, 580 and 850, insofar as applied to industries affecting Commerce, repugnant to the Commerce (Article I Section 8) and Supremacy (Article VI Clause 2) Clauses of the United States Constitution and hence deprived the State Grand Jury of jurisdiction to make the stated inquiries. This Court decided the stated contention adversely to appellant."

And the Supreme Court, New York County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Gearon Kimball, Deputy Clerk.

[fol. 153] SUPREME COURT OF THE UNITED STATES

No. 189—October Term, 1957

[Title omitted]

ORDER DISMISSING APPEAL AND GRANTING CERTIORARI—
October 14, 1957

Appeal from the Court of Appeals of the State of New York.

This Cause having been submitted on the statement of jurisdiction, motion to dismiss or affirm, and transcript of record,

On Consideration Whereof, It is ordered by this Court that the motion to dismiss the appeal herein be, and it is hereby, granted.

It Is Further Ordered that the appeal herein be, and it is hereby, dismissed.

Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is granted limited to question 2 presented by the jurisdicti nal statement which reads as follows:

"2. SELF INCRIMINATION.

Whether an employer in an industry affecting commerce, called before a Grand Jury of the State as a witness in the course of an investigation concerning the state penal offenses of bribery, extortion and conspiracy connected with labor union operations, is privileged, by the Fifth Amendment to the United States Constitution, to decline to answer questions of such character that affirmative answers thereto would establish the *corpus* of the federal crime of unauthorized payment of moneys to an official of the labor union representing his employees, Taft-Hartley Act, Sec. 302 (29 U.S.C. 186; 61 Stat. 157); and whether his ensuing punishment for contempt by a State Court is not barred by the Supremacy Clause, Art. VI, Cl. 2 of the United States Constitution and also by the "Privileges and Immunities" Clause of the Fourteenth Amendment."

Clerk's Certificate to foregoing transcript omitted in printing.

No. [redacted] 189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

MILTON KNAPP,

Appellant,

against

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions and FRANK S. HOGAN, District Attorney of the County of New York,

Appellees.

JURISDICTIONAL STATEMENT.

BERNARD H. FITZPATRICK,
Counsel for Appellant,
37 Wall Street,
New York 5, N. Y.

INDEX.

CASES.

Statutes.

Authorities.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

MILTON KNAPP,

Appellant,

against

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions and FRANK S. HOGAN, District Attorney of the County of New York,

Appellees.

JURISDICTIONAL STATEMENT.

Appellant appeals from a final order of the New York Court of Appeals affirming, as did the intermediate appellate court, an order of the New York Supreme Court, Special Term, New York County, denying and dismissing appellant's petition in a prerogative writ proceeding for review of (certiorari) and prohibition against a Mandate of the Court of General Sessions, New York County, imposing a fine upon appellant and committing him to jail for a criminal contempt of that court.

Opinions Below.

The New York Court of Appeals handed down no opinion but amended its remittitur to show the necessary decision of the two federal questions involved 2 N. Y. 2d . A print of the decision slip on motion to amend remittitur will be found in Appendix "A" hereto at page 43.

The New York Supreme Court, Appellate Division, First Department, per Bergan, J. rendered an opinion which is reported at 2 App. Div. 2d, 579 and 157, N. Y. Supp. 2d 158, and is printed in Appendix "A" hereto at page 35.

The New York Supreme Court, Special Term, New York County, Markowitz, J. rendered an opinion which is unreported and which is printed in Appendix "A" hereto at page 34.

The Court of General Sessions of New York County, Schweitzer, J. rendered an opinion which is not officially reported but appears at 157 N. Y. Supp. 2nd 820 and is printed in Appendix "A" hereto at page 23.

Jurisdiction.

Jurisdiction by appeal is founded upon the question of Federal preemption referred to immediately below. In addition, it is respectfully submitted, both that question and the question of self-incrimination presented by this record are sufficiently substantial and important, each in itself, to warrant grant of certiorari.*

This proceeding originated in the Court of General Sessions of New York County, which on May 22, 1956 summarily convicted the appellant, who is an employer in an industry affecting commerce, called as a witness before a Grand Jury of New York County, of a criminal contempt for his refusal to answer, in the course of an investigation under New York Penal Law, Sections 380, 580 and 850, dealing with bribery of labor union representatives, conspiracy and extortion, questions directed to the ascertainment of whether he had paid money to certain named officials of the labor union representing his employees. The

* *Cf.* "The questions are substantial", *post*, page 11.

conviction overruled a contention of the appellant made on April 30th, 1956, the first day on which a motion to punish for contempt was made, to the effect that Taft-Hartley Act, Section 302, 29 U. S. C. 186, 61 Stat. 157, authorizing certain payments by employers to union representatives and prohibiting, under penal sanction, all other such payments, preempted the field of regulation of such payments, wherefore the said state statutes as here applied, were repugnant to the cited federal statute and furnished no basis for the jurisdiction of the Court of General Sessions or its appendant Grand Jury to compel his testimony.

Review was had by petition, dated and served on the day of conviction, addressed to the New York Supreme Court, Special Term, New York County, under Article 78 of the New York Civil Practice Act, a statutory substitute for the writs of certiorari to review and prohibition. The petition asserted, *inter alia*, want of jurisdiction in the Court of General Sessions by reason of federal preemption. The petition was denied and dismissed on July 3rd, 1956. On the same day notice of appeal to the Appellate Division of the Supreme Court, First Department was served and filed. The Appellate Division affirmed on November 27th, 1956. On December 1, 1956 notice of appeal to the Court of Appeals was served and filed. The Court of Appeals affirmed by final order dated March 8th, 1957. On April 4th, 1957 it amended its remittitur to show that it had necessarily entertained the aforementioned contention of federal preemption and decided it adversely to appellant.

Notice of appeal to this Court was served and filed on May 13, 1957, with the Clerk of New York Supreme Court, New York County, that being the Court possessed of the record. As stated in the notice of appeal, appellant claims that this Court has jurisdiction by appeal under 28 U. S. C.

1257(2), the State Courts having held valid New York Penal Law Sections 380, 850 and 580 against a claim of repugnance to Taft-Hartley Act Sec. 302, 29 U. S. C. 186, 61 Stat. 157.

The jurisdiction of this Court by appeal is supported by the following cases:

Dahnke Walker Milling Co. v. *Bondurant,* 257 U. S. 282;

La Crosse Tel. Co. v. *Wisconsin Board,* 330 U. S. 18;

Bethlehem Steel Co. v. *N. Y. S. L. R. B.,* 330 U. S. 767; the amended remittitur being conclusive as to sustaining the validity of the State statutes, as applied, against a claim of repugnance;

Charleston Ass'n v. *Alderson,* 324 U. S. 182.

Questions Presented.

1. Preëmption.

Whether New York Penal Law, Sections 380, 580 and 850, dealing, respectively, with bribery of labor union representatives, conspiracy and extortion, are, as applied to payments passing between employers in industries affecting commerce and officials of labor unions representing their respective employees, repugnant to and superseded by a federal statute preempting the field of penal control of such payments, viz., Taft-Hartley Act, Section 302 (29 U. S. C. 186; 61 Stat. 157) authorizing certain payments by employers to labor union representatives and prohibiting, under penal sanction, all other such payments so as to deprive a Grand Jury of the State of jurisidiction to compel, by contempt process, testimony by an employer engaged in commerce, called as a witness, concerning pay-

ments by him to named officials of the labor union representing his employees.

2. Self Incrimination.

Whether an employer in an industry affecting commerce, called before a Grand Jury of the State as a witness in the course of an investigation concerning the state penal offenses of bribery, extortion and conspiracy connected with labor union operations, is privileged, by the Fifth Amendment to the United States Constitution, to decline to answer questions of such character that affirmative answers thereto would establish the *corpus* of the federal crime of unauthorized payment of moneys to an official of the labor union representing his employees, Taft-Hartley Act, Sec. 302 (29 U. S. C. 186; 61 Stat. 157); and whether his ensuing punishment for contempt by a State Court is not barred by the Supremacy Clause, Art. VI, Cl. 2 of the United States Constitution and also by the "Privileges and Immunities" Clause of the Fourteenth Amendment.

Statutes Involved.

Federal: Labor-Management Relations Act, 1947 (Taft-Hartley Act) Section 302, 29 U. S. C. §186, 61 Stat. §157 Constitution. Art. I, Section 8 Cl. 3 (commerce) Art. VI Cl. 2 (supremacy) Amendment V (self-incrimination) Amendment XIV, Section 1 (privilege and immunities).

New York State: Penal Law Sections 380 (bribery of union officials), 850 (Extortion); 580 (conspiracy).

The texts of the foregoing, so far as material, are set forth in Appendix B hereto.

Statement.

A. Proceedings in General Sessions.

The appellant is a co-partner of Eagle Reel and Manufacturing Company, a Bronx (118)* concern, concededly (223) engaged in interstate commerce. The manufacturing operations of Eagle Reel are organized by a labor organization known as Local 239, International Brotherhood of Teamsters of which one Philip Goldberg (sometimes referred to as "Greenberg" in the record) is an official (215).

There have existed and now exist contractual relations between the employing firm and that local union covering the wages, hours and working conditions of the employees (209-213).

The appellant on April 23, 1956 appeared before the Third April Grand Jury of New York County and was asked a series of questions designed to elicit information as to payment of monies from appellant employer to Goldberg. Appellant declined to answer on the ground that the answers might tend to incriminate him. Typical of the questions are the following which, if answered affirmatively, would establish the *corpus* of a violation of section 302 of the Labor Management Relations Act of 1947 (Taft-Hartley Act, 29 U. S. C. §186):

> "Q. Mr. Knapp, on or about October 28th, 1955, did you give Phillip Goldberg, a representative of Local No. 239, International Brotherhood of Teamsters, the sum of $500" (62)?
>
> "Q. Mr. Knapp, on or about October 28th, 1955, did you go to the Public National Bank and Trust Company at 149th Street and Prospect Avenue and

* References are to folios in the record before the Court of Appeals which is the record certified to this Court.

cash this check, Grand Jury Exhibit Number One, and receive from the bank the sum of $500" (63)?

"Q. Mr. Knapp, on October 28th, 1955, were you accompanied by Phillip Goldberg, an official of Local No. 239, International Brotherhood of Teamsters, when you went to the Public National Bank and Trust Company, located at 149th Street and Prospect Avenue" (64)?

"Q. Isn't it a fact that Sam Goldstein is an official of Local No. 239, International Brotherhood of Teamsters" (66)?

"Q. Did you ever pay or give any sum of money to Samuel Goldstein" (67)?

Thereafter the Grand Jury conferred immunity on the appellant. The same questions were again put to him and he again asserted his privilege against self-incrimination.

Appellant was resubpoenaed to appear before the Grand Jury on April 25, at which time the same questions were put to him. He continued to assert his privilege and was directed by the foreman to appear before the appellee, Honorable Mitchell D. Schweitzer, Judge of the Court of General Sessions (78-106) in Part I of that court.

There the District Attorney made application for a direction by the Court to the appellant to answer the questions put to him in the Grand Jury (77). The application was founded upon a statement by the District Attorney that "there is now pending" before the Grand Jury a John Doe investigation of conspiracy, bribery and extortion among labor officials (77). Appellee Judge Schweitzer directed appellant to return to the Grand Jury on April 27 and answer the questions over the objection that the appellant asserted his privilege in apprehension of a danger of admitting the *corpus* of a violation of the Taft-Hartley Act (138, 140):

The appellant obeyed the direction to return to the Grand Jury but continued to assert his privilege and respectfully declined to answer the same questions. Thereupon the District Attorney again procured appellant to appear on April 30th before appellee Judge Schweitzer, where the District Attorney moved the Court to punish the appellant summarily for contempt.

Counsel for the appellant thereupon, after establishing involvement in commerce (207-228), raised the issue that the Court of General Sessions had no jurisdiction of any offense involving the payment of money to a labor organization or its agents by an employer in interstate commerce, the field having been preempted by the Labor Management Relations Act, 1947 (Taft-Hartley Act, Sections 7 and 302) (226, 232-249). Judge Schweitzer adjourned the proceeding so that briefs could be exchanged on the question of Federal preemption (262).

At a continuance on May 21, 1956 counsel for appellant summarized his opposition to the District Attorney's application to punish appellant in four points (285, 286) of which two are germane on this appeal:

> "Second, the immunity conferred on the witness pursuant to Section 2447 is insufficiently broad in that it does not comprehend an immunity from prosecution under the applicable Federal statutes;"
>
> "Fourth, even if every other portion of the proceedings were proper, the respondent contends that the Court and the Third April Grand Jury has no jurisdiction of the subject matter of the investigation by reason of the preemption of the field by the Taft-Hartley act and, in particular, Sections 7 and 302 of that enactment."

The Court expressly ruled on the preemption question (289) and on the self-incrimination question (292).

On May 22 the Court adjudged appellant guilty of contempt, sentenced him to confinement in the civil prison for a period of 30 days and fined him $250.

B. Proceedings in Special Term.

Following the commitment, appellant petitioned the Supreme Court, Special Term, New York County for review (certiorari) and prohibition under Article 78 of The New York Civil Practice Act. The petition recited the partnership of appellant in the Bronx firm, the involvement of the firm in interstate commerce, the organization of the plant by Local Union 239, the official status of Greenberg (Goldberg) in the Union and the existence of collective contractual relations between the Union and the Bronx firm, the appearance of appellant as a witness before the Third April Grand Jury, the questioning of petitioner to elicit information as to payments to Greenberg, the assertion by appellant of his privilege against self-incrimination, the conferring of immunity upon appellant by the Grand Jury and petitioner's subsequent adherence to his claim of privilege, the application of the appellee District Attorney before the appellee Judge for an instruction to the appellant to answer and the direction to the appellant to answer over the following objections *inter alia*:

> (a) That the Court of General Sessions of the Peace of the City and County of New York had no jurisdiction of any offense involving the payment of money to a labor organization or its agents by an employer whose employees are engaged in interstate commerce by virtue of the Labor Management Relations Act of 1947 (Taft-Hartley Act, Sections 7 and 302);
>
> (b) That the grant of immunity pursuant to Section 2447 of the Penal Law is insufficiently broad in that it does not bar prosecution of the petitioner

for violation of Section 302 of the Labor Management Relations Act of 1947.

The petition below goes on to recite appellant's adherence to his refusal to answer, the application to punish him for contempt, the adjudication of contempt and his commitment. The petition concludes with an averment of initial application and a prayer for prohibition and review.

The amended answer apparently raised no factual issue but denied the validity of the appellant's objections to answering the questions, pleaded the legal insufficiency of the petition and prayed for denial and dismissal.

The reply set up *inter alia*, on the issue of appellant's jeopardy in respect of Federal prosecution, that the Federal Prosecutor, Paul Williams, had publicly stated his intention to cooperate with the appellee District Attorney in the investigation of labor union bribery and extortion and that said appellee intended on his part to cooperate with the Federal Prosecutor.

No triable issue of fact appeared on the hearing and the Special Term, upon the pleadings and the minutes of General Sessions dismissed the petition and denied the same. The memorandum opinion (379) adopted the reasoning of the opinion in the Court of General Sessions.

C. Proceedings in Appellate Division.

On appeal taken to the Appellate Division, First Department, a unanimous order affirming the order of the Special Term was entered on November 27th, 1956, with opinion by Bergan, J. in which all concurred. The opinion did not touch the question of federal preemption; it dealt solely with the question of self-incrimination.

D. Proceedings in Court of Appeals.

The Court of Appeals affirmed without opinion by order of March 8th, 1957. However, it indicated, by order of April 4th, 1957 amending its remittitur, that it had necessarily entertained the question of federal preemption and the question of the right, under the Fifth Amendment, of appellant to decline to answer and decided the questions adversely to appellant.

The Questions Are Substantial.

1. Preëmption.

The federal Act upon which the preemption claim is based, Section 302 of the Taft-Hartley Act, is substantively so designed that it

1. authorizes certain payments by employers in commerce to employee representatives (Sec. 302(c)).
2. prohibits all other payments by employers to employee representatives (Sec. 302(a), (b)).

Procedurally, the Act is so designed as to be enforceable by penal sanction (Sec. 302(d)) and by federal civil action (Sec. 302(e)). In addition, many infractions of the Section would also constitute the unfair labor practice of "company domination" (29 U. S. C. Sec. 158(a)(2) which would be remediable (29 U. S. C. Sec. 160) by cease and desist orders, disestablishment or other administrative measures.

The exhaustive character of this scheme is no accident. Congress, in 1947, found itself in the position that the prior Act, the Wagner Act, had (Sec. 8(2)), in seeking to prevent company domination of labor unions, drawn in question the validity of every species of financial or other support

by an employer of a union or of the objectives of a union.[1] It was then, as it still is, an unfair labor practice

> " . . . for an employer (in commerce) . . . to contribute financial or other support to (a labor organization)."

The broadness of that language, coupled with the investiture of the administering agency with a policy-making function in that regard, which, though limited, was without standards, rendered undesirably uncertain the entire subject of payments by an employer to the representatives of his employees. The uncertainties were obstacles to the achievement of certain legitimate objectives of the labor movement, including dues collection and pension and welfare benefits.

On the other hand, the unilateral character and usually mild remedies of the administrative process had been ineffective against some vicious forms of domination, such as the bribery of labor representatives, colloquially known as the "sell out", and was inadequate to check the use, by the unscrupulous, of the right to strike, guaranteed by Section 7 of the Wagner Act, as a weapon of extortion.

Congress, therefore, had the dual task of affirmatively validating, with safeguards, those payments consonant with legitimate labor objectives, notably the dues check-off and welfare funds, while placing more adequate sanctions upon domination achieved through the power of the purse especially in the form of bribery and upon the use of the federally guaranteed "right to strike" for purposes of extortion.

The result is a statute which spells out all righteous payments and spells out all wrongful payments and is remedially plenipotent. No payment in this field can pos-

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[1] *Cf.* Statement of Rep. Case, 93 Cong. Rec. 3623, Apr. 15, 1947; 1 Leg. Hist. 753.

sibly be made the rectitude of which cannot be judged by this Federal statute and every departure from rectitude can be restrained, corrected and punished by the Federal means specially provided.

It is not without importance to observe that Section 302 operates as part of a larger federal statutory scheme organically conceived[2] to regulate labor, labor organizations, individual employees and employers in their interrelations and in their relations to the general welfare. The *milieu* is entirely federal.

Arrayed against this gapless scheme of Federal policement of payments to union officials are two[3] statutes of New York State upon which the authority of its Grand Jury to enquire depends.[5] One of these, the extortion statute,[4] is a statute of general application. The *gravamen* is the obtaining of property by "wrongful" use of force or fear or under color of "official right."

The other state statute[6] is oriented toward labor relations as such. Employers are forbidden to pay "duly appointed representatives" of labor organizations, and the representatives are forbidden to receive payment with the design that any official conduct of the representative, including expressly the calling or prevention of a strike, shall be influenced by the payment. Neither state statute contains a catalogue of payments which may rightfully be made.

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[2] *Cf.* 29 U. S. C. 141(b), declaring the policies of L. M. R. A.

[3] The third state statute involved, Section 580, Penal Law, the conspiracy count, draws whatever application it has to this case from the bribery statute, P. L. Section 380, or the extortion statute, P. L. Section 850. Hence it is not separately considered.

[4] Penal Law Section 850, Appendix "B", page 49, *post*.

[5] *Cf.* "Decision Amending Remittitur", Question 2, Appendix "A", page 44 *post*.

[6] Penal Law Section 380, Appendix "B", page 48, *post*.

It is immediately apparent that if either of these state statutes be applied to payments passing between employers and representatives involved in commerce, the State is stepping into a field the rights and wrongs of which are completely established by Section 302 of L. M. R. A. Congress has already said what is right, and all that is right, and affirmatively permitted it; it has also said what is wrong, and all that is wrong, and proscribed it. What room does such an all-inclusive substantive enactment leave for pronouncement by the states of standards of conduct based either on identical or different criteria?

Nor is the face of Section 302 the only matter of federal law to be taken into account in appraising the question of preemption: that Section is dovetailed into the complete scheme of regulation of labor relations, which, save for a few small islands, is the *mare nostrum* of the general government. The federal interest in the labor relations field is dominant.[1] Regulation of the field of payments to employee representatives is merely one facet of the underlying general policy of encouraging collective bargaining through representatives free of the trammels of employers; a policy implicit in the terms "self-organization" and "representatives of their own choosing".[2] Indeed, it is difficult to see how a state court could charge its jury on a count of bribery or extortion involving labor representatives unless, as the California court did in the *Garmon* case,[3] it were to " 'apply' or in some sense follow" federal law. The identity and status of representatives are

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[1] Dominance of the federal interest in the field of legislation has been recognized as a ground of preemption. *Commonwealth* v. *Nelson*, 350 U. S. 497.

[2] 29 U. S. C. 151, 157.

[3] *San Diego B. T. Council* v. *J. S. Garmon Co.*, No. 50 Oct. Term 1956, March 25, 1957.

determinable federally,[1] as is the scope of organization.[2] Strike objectives and motivation, as distinguished from methodology, are matters of federal law.[3] "Grievance time" payments, though not specifically exempt under Section 302 are justifiable under Section 8(a)(2) of NLRA (29 USC 158(a)(2)). Verily, Section 302 is but a single thread in the web of labor relations law, and that web is seamless and it is federal.[4]

What was said in the *Guss* case[5] of another, but related, segment of the national labor policy may be said here:

> "The National Act expressly deals with the conduct . . . which was the basis of the state tribunals' actions."

And it may not be said here, as in *Laburnum*[6] that Congress has left open a remedial aspect of the conduct, for here the National Act imposes the same sort of penal sanction as do the state statutes.

While the preservation of the "traditional police powers of the states" is a *desideratum*, we do not have here the question of whether the area should be policed as is the case when both legislatures are trying to regulate different fields and collide only incidentally. Here both legislatures seek to regulate identical conduct; the question is whether one hamlet shall have two autonomous police departments. Unlike the California statute involved in the *Zook*[7] case,

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[1] 29 U. S. C. 159 (a), (c).

[2] 29 U. S. C. 159 (b).

[3] *U. A. W.* v. *O'Brien*, 339 U. S. 454.

[4] *Cf. Textile Workers Union* v. *Lincoln Mills*, No. 211, Oct. Term 1956, Sec. June 3, 1957, for a case extending the scope of federal concern to embrace substantive contract law.

[5] *Guss* v. *Utah L. R. B.*, No. 280, Oct. Term 1956; March 25, 1957.

[6] *United Construction Workers* v. *Laburnum Constr. Corp.*, 347 U. S. 656.

[7] *California* v. *Zook*, 336 U. S. 730.

the New York statutes here involved permit, to continue the metaphor, each police department independently to operate its own traffic control system on the same highway. In *Zook* the federal elements of the offense were determinable by the proper federal administrative body.

When two legislative bodies attempt to regulate the substance of so narrow a field as that of payments between employers and employees' representatives it is but a short step from concurrence to conflict. There is a paucity of decisions under these particular New York statutes which prevents counsel from showing actual variations of New York cases from the policy of the federal statute, nevertheless, the seeds of conflict are present, and no great imagination is required to see how easily fact situations might fertilize them. Suppose the witness in the case at bar, asked whether he had paid Goldberg, were to respond:

> "Yes, he said the union would strike unless I made a donation to the welfare fund, so I gave him $500 in cash."

Neither New York statute exempts welfare funds. Does the New York court then proceed to punish for what may possibly be a valid federal purpose? Or does it examine the federal statute, determine that the ambiguous phrase "such payments" in Section 302(c)(5)(B) refers to certainty of contribution rate rather than to certainty of benefits—and convict?

Or, to cull from the newspapers a publicized practical example,[1] would New York under the narrow philosophy of its Penal Law convict Mr. Dubinsky for accepting the contribution to his welfare fund made by a manufacturer in order to maintain competitive parity of labor costs between his low rate non-unionizable Southern plant and his New

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[1] The incident is described in an article in The New York Times reproduced in this record at page 113.

York plant operated at union wage scales? Under the broader outlook of LMRA, the payment, though possibly within the technical prohibition of Section 302, might be a "protected activity" because it accomplishes an objective sought by the basic policies of NLRA—the "stabilization of competitive wage rates and working conditions within and between industries".[1] The New York statutes are pregnant with conflict.

It is submitted that a substantial question, hitherto undetermined by this Court, drawing in question the validity, as applied, of New York Penal Law Sections 380, 580 and 850 on the ground that they are repugnant to Taft-Hartley Act Section 302 and the Commerce clause of the Constitution, exists: that notice of appeal, setting forth that question has been served and filed within the 90 days succeeding March 8th, the date of the order of the State Court of last resort, and that appeal, therefore, lies.

Apart from the substantiality of the question, reasons for review exist. There appears to be a conflict, at least in principle, on the question of preemption between the decision of the New York Court of Appeals in the instant case and the decision of the highest court of Utah. *Utah* v. *Montgomery Ward & Co.* (1951), 120 Utah 294, 233 Pac. 2nd 685.

The Supreme Court of Utah had held a statute of that state, making it a crime for an employer to decline to honor a checkoff assignment made by an employee in favor of a labor union, repugnant to Section 302 of the Taft-Hartley Act. Although the express reasoning of the *Montgomery Ward* opinion rests upon the rather narrow "checkoff" provision of Section 302(c), it would seem that, the entire subject of payments to representatives, being regulated to

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[1] 29 U. S. C. Sec. 151. For a similar subordination of the language of the Act to its basic policies *cf. Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270.

the point of exhaustion by Section 302, it is necessarily embraced within the reasoning and a conflict in principle exists. The denial of certiorari by this Court in the *Montgomery Ward* case[1] affords no basis for resolution of the conflict.

A resolution of this question of preemption is important to the administration of the laws of many states. Four states have bribery statutes specifically relating to labor representatives.[2] Twenty-five states have statutes governing in various ways, the "checkoff".[3] It may be assumed that all states prohibit extortion, although whether the strike weapon is regarded as a means of extortion in all states is necessarily not precisely determinable.

It is respectfully submitted that the preemption question is substantial. It is further submitted that, even if the question were not appealable, it has an importance sufficient to warrant grant of certiorari.

2. Self-Incrimination

Appellant is required, under criminal penalty, by the courts of New York, to confess to having committed the *corpus* of a Federal crime, or to deny the same. Although the New York State Constitution prohibits compulsory self-incrimination, the Court of Appeals has denied him its protection and he is concluded on that issue. Hence he is here in naked reliance upon the Fifth Amendment to the Federal Constitution, maintaining that by its terms he may not be compelled in any tribunal—even that of a state—to confess a federally cognizable crime.

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[1] 342 U. S. 689.

[2] 4 CCH Labor Law Reporter ¶40355 pp. 40332, 3.

[3] 4 CCH Labor Law Reporter ¶40355 pp. 40354, 5.

It may be said, even in the face of *dictâ* in *Jack* v. *Kansas*[1] that the question is one of first impression. Nor did the *Feldman* case[2], wherein testimony given under state immunity was held usable in a federal prosecution, involve the question, for there was in that case no timely assertion of federal privilege. The appellant's contention here is not the contention raised and disposed of in the *Twining*[3] and *Adamson*[4] cases that the prohibition of the Fifth Amendment is, by the implications of the Fourteenth, controlling on the state in the administration of state law. Whatever be the merits of those cases they are not in issue here.

Here the contention is that by direct force of the Fifth Amendment, no citizen may be compelled to incriminate himself of federally cognizable crime in any tribunal—be it state or federal. He would have the Court read the amendment thus

> "No person • • • shall be compelled in any [federal] criminal case to be a witness against himself."

Thus read,[5] the Amendment is a guaranty to him of safety against federal prosecution inspired by or based upon testimony wrung from him by compulsion. The limitation

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[1] 199 U. S. 372. The state court had limited the scope of inquiry to intrastate transactions; it is difficult to see that any federal question was presented by the record. The dicta were, however, reiterated in other cases decided on the "dual sovereignty" theory, none of which involved a state inquiry. The *Jack* case is the only case in this Court involving the point. cf. J. A. C. Grant: "Immunity from Compulsory Self Incrimination in a Federal System of Government", 9 Temple L. Q. 57, 68.

[2] *Feldman* v. *U. S.*, 322 U. S. 487.

[3] *Twining* v. *New Jersey*, 211 U. S. 78.

[4] *Adamson* v. *California*, 332 U. S. 46.

[5] *Barron* v. *Baltimore*, 7 Pet. 243. The other safeguards of the Fifth Amendment are likewise so limited; grand jury, double jeopardy, due process (until the adoption of the Fourteenth).

is a limitation upon the action of the prosecuting arm of the federal government. This is the clear import of the immunity cases,[1] of the pardon cases,[2] of the statute of limitation cases[3] and of the *autrefois* adjudication cases.[4] Where the prosecution is completely barred, the privilege dies; where it is not the privilege lives.[5] The privilege does not exist where the danger apprehended is not a danger of prosecution.[6]

Around the fundamentals of the privilege there has grown up—with sound reason and with legislative as well as judicial aproval—the ancillary right of declining to testify in any inquisition, whether or not the witness be under indictment or presentment, or whatever be the purpose of the inquisition. This ancillary right exists not because there is any danger to the witness in the inquisition, but because the prosecuting arm of the federal government might be bestirred by the revelations made in the course of the inquisition. The law fears the creation of a tandem between inquisitor and prosecutor whereby a person under compulsion may be forced to feed the prosecutor to his own damnation.

The right to decline to answer before a purely inquisitorial body such as a Congressional committee is merely ancillary to the right to avoid federal prosecution springing from one's own testimony. A Congressional committee is limited in its inquiry not because it is a federal agency but because its compulsion might aid or inspire the action of a

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[1] *Counselman* v. *Hitchcock*, 142 U. S. 547.

[2] *Brown* v. *Walker*, 161 U. S. 591.

[3] *People* v. *Cahill*, 126 App. Div. 391, aff'd 193 N. Y. 232.

[4] *Lathrop* v. *Roberts*, 16 Colo. 250, 27 Pac. 698.

[5] *Counselman* v. *Hitchcock*, *supra*; *Burdick* v. *U. S.*, 236 U. S. 79; *Ex parte Irvine* 74 Fed. 954.

[6] *Ullmann* v. *U. S.*, 350 U. S. 422.

federal prosecuting agency. The right arising from the Fifth Amendment is primarily a right to avoid prosecution or conviction and only secondarily a right to decline to testify.

Thus when it is said that the Fifth Amendment is a limitation upon the operations of the federal government and not a limitation upon the states, what is meant is that the primary right—the right to avoid prosecution or conviction—is a right to avoid federal prosecution or federal conviction; and conversely, that the Fifth Amendment is not designed as a protection against state prosecution or state conviction.[1] The statement has no relation to the ancillary right of refusal to testify or to the tribunal in which the ancillary right is asserted.

The question then becomes: May a citizen, possessed of a right to avoid a federal prosecution to which there is ancillary a right to decline to testify, be deprived of that ancillary right by a state? Stated in another way: May a state make itself part of a tandem whereby a federal prosecutor may convict through state testimonial compulsion?

It is respectfully submitted that these queries must be answered in the negative. The ancillary right to decline testimony is as federal in origin as the primary right from which it springs—the right to avoid federal prosecution. As a right originating in a federal constitutional immunity, it is part of the supreme law of the land and is binding upon the states.[2]

Moreover, since the privilege and the immunity spring from the Federal Constitution, they are privileges and

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[1] Though federal tribunals recognize a claim of self-incrimination where danger of state prosecution is apprehended, the recognition is not placed upon the footing of the Fifth Amendment. *cf. U. S.* v. *Saline Bank* 1 Pet. 100; *Ballman* v. *Fagin* 200 U. S. 186.

[2] Cf. *Adams* v. *Maryland*, 347 U. S. 179 for a case applying the supremacy clause in testimonial matters; a federal statute barring use of testimony in "any court", held to bind state courts.

immunities attaching to appellant in his capacity as a citizen of the United States. Hence, by the Fourteenth Amendment they may not be abridged by the states. While the tenor of prior decisions is to the effect that the Fourteenth Amendment is not a mandate on the states to observe the provisions of the Fifth Amendment in respect of self incrimination, the case at bar involves a right of that limited class arising

> "... out of the nature and essential character of the federal government and granted or secured by the Constitution."[1]

The question presented is not only substantial; it is obviously important to the administration of justice by the states.[2] The increasing complexity of modern life is bringing about more and more federal legislation dealing with subjects on which there is state legislation; the areas of contiguity are constantly expanding. The problem posed by this case will be an oft-recurring problem.

Dated June 6, 1957.

Respectfully submitted

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37 Wall Street
New York 5, N. Y.

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[1] *Duncan* v. *Missouri*, 152 U. S. 382; *Slaughterhouse Cases*, 16 Wall. 36.

[2] The National Association of Attorneys-General in September 1955, by vote of 23 to 14 passed a resolution calling for the enactment of a federal act permitting states to grant immunity against federal prosecution in cases involving subversion, complaining that, in practice, the federal danger made witnesses reluctant. N. Y. Times 9/18/55 p. 19: 2-3. Although the field of subversion has been declared preempted, obviously the condition is operative in other fields.

APPENDIX A.

Opinions Below

Opinion of Schweitzer, J.

COURT OF GENERAL SESSIONS.

(157 N. Y. S. app. 2d 820 sub nom. People *v.* Knapp).

[Same Title.]

Schweitzer, J.:

This is an application by the District Attorney pursuant to the Judiciary Law (§§750, 751) to have the respondent Milton Knapp adjudged in Contempt of Court for refusing to answer certain questions asked of him upon his appearance as a witness before the Third April, 1956 Grand Jury of this Court.

Among the proceedings pending before that Grand Jury was one entitled "People against John Doe, et al.", an inquiry designed to determine whether the crimes of Conspiracy (Penal Law, §580), Bribery of Labor Representatives (Penal Law, §380) and Extortion (Penal Law, §850) were being committed or had been committed in this county. In the course of that inquiry, Milton Knapp, one of two partners conducting business as Eagle Reel & Manufacturing Co., was subpoenaed to appear before the Grand Jury and to produce certain books and records. He appeared before the Grand Jury on April 23rd, 1956, was duly sworn and was asked the following question:

> "Q. Now, who represented the union in these negotiations leading to a salary increase?"

The witness refused to answer that question, stating that he did so on the advice of his lawyer and on the ground that it might tend to incriminate him.

The Grand Jury thereupon voted to grant the witness immunity, in accordance with the provisions of section 2447 of the Penal Law, and at the express request of the District Attorney, the foreman of the Grand Jury directed the witness to answer the question. The witness, however, again refused to answer on the same ground of possible self-incrimination.

Two days later, on April 25th, 1956, the witness reappeared before the Grand Jury and while under oath, was asked a series of questions, each of which he refused to answer on the ground of possible self-incrimination, notwithstanding that the foreman of the Grand Jury, at the District Attorney's request, directed the witness to answer each question, thereby assuring him of the immunity provided for by section 2447 of the Penal Law.

The questions thus put to the witness, which he refused to answer, were as follows:

> "Q. Mr. Knapp, do you know a man named Philip Goldberg?
>
> Q. Mr. Knapp, do you know whether Philip Goldberg is an official of Local No. 239, International Brotherhood of Teamsters?
>
> Q. Mr. Knapp, on or about October 28, 1955, did you give Philip Goldberg, a representative of Local No. 239, International Brotherhood of Teamsters, the sum of $500.00?
>
> Q. Mr. Knapp, I show you this check marked Grand Jury Exhibit one of today's date in the sum of $500.00 and ask whether you recognize it.
>
> Q. Mr. Knapp, on or about October 28, 1955, did you go to the Public National Bank & Trust Company at 149th Street and Prospect Avenue and cash this check, Grand Jury Exhibit No. one, and receive from the bank the sum of $500.00?
>
> Q. Mr. Knapp, on October 28, 1955, were you accompanied by Philip Goldberg, an official of Local No. 239, International Brotherhood of Teamsters, when you went to the Public National Bank & Trust

Company located at 149th Street and Prospect Avenue?

Q. Mr. Knapp, I again show you Grand Jury Exhibit No. one of today's date and ask whether your handwriting appears on the face of that check?

Q. Mr. Knapp, I show you a stub book that appears to be a check stub book, and I ask you to examine this check stub book and tell me whether your handwriting appears on the space assigned to No. 2908, that is, the box?

Q. Mr. Knapp, I direct your attention to the box No. 2908, and I ask you to tell the Grand Jury what initial appears before the name, Goldberg?

Q. Mr. Knapp, I ask whether Grand Jury Exhibit No. two of today's date is in fact a stub book used by the Eagle Reel and Manufacturing Co.?

Q. Mr Knapp, when was the last time you spoke to Philip Goldberg?

Q. Do you know a man named Sam Goldstein?

Q. Isn't it a fact that Sam Goldstein is an official of Local No. 239, International Brotherhood of Teamsters?

Q. Did you ever pay or give any sum of money to Sam Goldstein?

The District Attorney and the foreman thereupon applied to this Court to direct the witness to answer the foregoing questions. Following a hearing at which the witness was represented by counsel, this Court ruled that the questions were proper in every respect and directed the witness to return to the Grand Jury room and to answer each of the questions.

On April 27th, 1956, the witness reappeared before the Grand Jury, each of the questions was again read to him, and he persisted in his refusal to answer each of those questions on the same stated ground of possible self-incrimination.

Thereupon, on April 30th, 1956, the present application was made to this Court for an order adjudging the witness, Milton Knapp, in Contempt of Court. A further hearing was held at which the witness was again represented by counsel. At this hearing, the witness raised the objection that the entire investigation by the Grand Jury was beyond its jurisdiction, the claim advanced being that the business in which the witness was engaged was an industry affecting interstate commerce, and that section 302 of the federal Labor Management Relations Act, 1947 (the so-called Taft-Hartley Act), 29 U. S. C. §186, had completely pre-empted the subject matter of payments made by an employer to a representative of employees in any industry affecting interstate commerce, and thereby rendered inoperative any state legislation on the same subject matter.

Section 380 of the Penal Law is entitled "Bribery of Labor Representatives", and makes it a misdemeanor for any duly appointed representative of a labor organization to solicit, accept or agree to accept a bribe from any person for the purpose of influencing his "acts, decisions, or other duties as such representative" or for the purpose of inducing him to refrain from causing or preventing "a strike or work stoppage or any form of injury to any business"; and it also makes guilty of a misdemeanor any person who gives or offers a bribe to such a representative for any such purpose. (See *People* v. *Cilento*, 1 A. D. 2d 206, 207, 208.)

Section 302 of the Taft-Hartley Act (29 U. S. C. §186), on which respondent witness here relies, makes it a misdemeanor, subject to certain stated exceptions, for an employer "to pay or deliver, or agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce", and likewise makes it a misdemeanor for any such representative "to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value". The section has been interpreted by the United States Supreme Court as creating a criminal offense of the nature of *malum prohibitum*, and as outlawing "all payments, with

stated exceptions, between employer and representative" (*United States* v. *Ryan*, 76 S. Ct. 400).

It has long been settled that "the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal governments and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each" (*California* v. *Zook*, 336 U. S. 725, 731, quoting from *United States* v. *Marigold*, 9 How. 560, 569; and other cases there cited).

The question, in essence, where the federal government has legislated on a subject within its jurisdiction and there is also state legislation affecting the same subject, is whether Congress intended to make its jurisdiction exclusive, thereby displacing the state statutes. It is established that "normally congressional purpose to displace local laws must be clearly manifested" (*California* v. *Zook*, *supra*, 336 U. S. at 733, and cases there cited). And where the claim is that the state legislation conflicts with the federal enactment, "it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation" (*Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 156).

One of the factors which has been given great weight in determining that Congressional action was not intended to override state legislation in the same area, has been that the state laws, if that be the case, are aimed at evils within the scope of the state's traditional police powers. Thus, in *Fox* v. *Ohio*, 5 How. 410, it was held that the act of passing counterfeit money, though a crime under the federal Criminal Code, could also be punished by the state as the perpetration of a fraud on the person to whom the spurious money was passed (see *Commonwealth of Pennsylvania* v. *Nelson*, 76 S. Ct. 477, 479, decided April 2nd, 1956). And in *Gilbert* v. *Minnesota*, 254 U. S. 325, a state enactment which prescribed interference with, or discouragement of, the enlistment of men in the military or naval service of the United States or of the state, was upheld as a valid "local

police measure", notwithstanding existing federal legislation on the same subject (see *Commonwealth of Pennsylvania* v. *Nelson, supra,* 76 S. Ct. at 479).

It has similarly been observed that the punishment of such acts as extortion, fraud and violence, among others, is within the ambit of the state's "usual police powers", which will not be deemed displaced by regulatory federal legislation in the field in which such acts are committed, in the absence of an express manifestation of such a Congressional purpose (see *California* v. *Zook, supra,* 336 U. S. at 732, 734-5).

"It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested." (*Reid* v. *Colorado,* 187 U. S. 137, 148; see *Kelly* v. *Washington,* 302 U. S. 1. 11).

Extortion (Penal Law, §850 *et seq.*) and bribery in connection with labor relations (Penal Law, §380) have long been the subject of regulation in this state. They are certainly within the ambit of the historic and traditional police power of the state. There is nothing in the language of the federal statute here involved or in its legislative history to suggest that Congress intended to foreclose the states from continuing to protect their inhabitants from such evils. On the contrary, such sources of Congressional intent as are available indicate that Congress did not propose to invalidate existing state legislation on such subjects or to preclude state action with regard thereto.

Respondent relies on a series of Supreme Court decisions in the field of labor relations which have held that the broad powers conferred upon the National Labor Relations Board by the Taft-Hartley Act for the regulation of unfair labor practices, operate to preclude the states from exercising jurisdiction over such practices, either in the administrative or in the judicial sphere, where the acts complained of do not reach the stage of violence or unlawful coercion (*Garner* v. *Teamsters, Chauffeurs & Helpers, etc.,* 346 U. S. 485;

Weber v. *Anheuser-Busch, Inc.*, 348 U. S. 468; *United Mine Workers* v. *Arkansas Oak Flooring Co.*, ___ U. S. ___, 24 L. W. 4197, decided April 23rd, 1956). In *Garner* v. *Teamsters, Chauffeurs & Helpers, etc., supra,* the Supreme Court, however, emphasized (346 U. S. at 488):

> "The national Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.
>
> This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is 'governable by the State or it is entirely ungoverned.' In such cases we have declined to find an implied exclusion of state powers. *International Union* v. *Wisconsin Board*, 336 U. S. 245, 254. Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. *We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways'. Allen-Bradley Local* v. *Wisconsin Board*, 315 U. S. 740, 749." (Emphasis supplied.)

The Supreme Court has thus held that applicable state remedies were not superseded by the jurisdiction reposed in the National Labor Relations Board, where the acts in question involved mass picketing, threats of violence and obstruction of public ways (*Allen-Bradley Local* v. *Wisconsin Board*, 315 U. S. 740) or constituted unlawful coercive tactics (*Auto. Workers* v. *Wis. Board*, 336 U. S. 245). In the latter case, the Court declared (336 U. S. at 252-253):

> "Congress has not seen fit in either of these Acts [the Taft-Hartley Act and the earlier Wagner Act] to declare either a general policy or to state

> specific rules as to their effects on state regulation of various phases of labor relations over which the several states traditionally have exercised control. • • • However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Relations Act of 1947, that 'Congress designedly left open an area for state control' and that the 'intention of Congress to exclude States from exercising their police power must be clearly manifested.' *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 750, 749. • • •"

Similarly, in *United Workers* v. *Laburnum Corp.*, 347 U. S. 656, it was held that the Taft-Hartley Act did not preclude the maintenance of a common law tort action in a state court for damages based upon tortious conduct of certain labor organizations, involving threats of violence and intimidation, notwithstanding that such acts also constituted unfair labor practices as defined by the federal statute. In its opinion in that case, the Court quoted from the Senate Report (No. 105, 80th Cong., 1st Sess. 50) preceding the adoption of the Taft-Hartley Act, as indicative of the design of that Act not to supersede state regulation where the acts to be regulated by the federal Act were also "illegal under State law" (347 U. S. at 668). The Court also quoted from a statement made by Senator Taft on the floor of the Senate that "There is no reason in the world why there should not be two remedies for an act of that kind" (347 U. S. at 668-9).

There is no claim or suggestion that the acts here under investigation by the Grand Jury constitute "unfair labor practices" subject to the exclusive jurisdiction of the National Labor Relations Board. Decisions such as *Garner* v. *Teamsters, Chauffeurs & Helpers, etc.* and *Weber* v. *Anheuser-Busch, Inc.*, *supra*, are therefore inapplicable. Rather, the situation here presented is more closely

analogous to the other cases noted above, in which the Supreme Court held that acts of violence, intimidation, disorder and tortious injury remain subject to state regulation for the safeguarding of local interests, notwithstanding the enactment of the Taft-Hartley Act.

Respondent also cites the recent decision of the Supreme Court in *Commonwealth of Pennsylvania* v. *Nelson*, *supra*, 76 S. Ct. 477, where a Pennsylvania sedition statute was held to have been superseded by the federal anti-sedition legislation. In reaching that conclusion, however, the Court emphasized that the federal legislation touched "a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject" (p. 481), and that the "enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program" (p. 482). The Court further pointed out that sedition was "not a local offense" but rather "a crime against the Nation" (p. 482). It is significant that the Court further noted the limits of its decision in the following words (p. 479):

> "Neither does it limit the right of the State to protect itself at any time against sabotage or attempted violence of all kinds. Nor does it prevent the State from prosecuting where the same act constitutes both a federal offense and a state offense under the police power • • •."

In the present case there is no doubt that the crimes of Bribery of Labor Representatives, Extortion and Conspiracy, which are the subject of the pending Grand Jury investigation, constitute local offenses within the reach of the state's traditional police powers. The mere fact that section 302 of the Taft-Hartley Act in a measure parallels the state statute governing one of these crimes, i.e., that of Bribery of Labor Representatives (Penal Law, §380), does not operate to invalidate the state enactment (*California* v. *Zook*, *supra*, 336 U. S. at 730). The pertinent decisions

make it clear that Congress will not be taken to have intended to debar the state from safeguarding its citizenry from pernicious evils of this kind. No conflict has been shown to exist, or is to be found, between the local statutes here involved and either the terms or the policy of the federal legislation. There is consequently no basis for holding that the state is without jurisdiction of these offenses, or that the Grand Jury lacks the power to conduct an investigation in relation thereto.

As a further justification for his refusal to answer the questions asked by the Grand Jury, respondent urges the fact that he has not been granted immunity thereby from possible Federal prosecution.

In this connection, it need only be observed that the immunity granted respondent (Penal Law, §2447) was the maximum which could be granted by this State (*People* v. *Breslin*, 306 N. Y. 294, *cert.* denied, 347 U. S. 1014). Consequently, the requirements of both the State and Federal Constitutions have been satisfied [*Brown* v. *Walker*, 161 U. S. 591; *Jack* v. *Kansas*, 194 U. S. 372; *Feldman* v. *U. S.*, 322 U. S. 487, 493; *People* v. *Breslin*, *supra*; *Dunham* v. *Ottinger*, 243 N. Y. 423, 438; *Matter of Herlands (Carchietta)*, 204 Misc. 373].

Respondent finally contends that this Court may not punish him summarily, since the Grand Jury is not in the immediate view and presence thereof, and that the proceedings must be initiated by an order to show cause.

In answering this contention, we need not consider whether the original refusal to answer the questions put by Grand Jury was a contempt committed in the constructive presence of this Court, since this Court heard sworn testimony by the Grand Jury stenographer both as to this original refusal and as to the subsequent refusal after a specific direction by this Court. Furthermore, respondent, in open court, has stated his refusal to answer the questions, thereby reaffirming the position taken before the Grand Jury. Under the circumstances, respondent's contempt was committed in the view and presence of this

Court (*People ex rel. Hackley* v. *Kelly*, 24 N. Y. 74). No further proof is necessary (*Douglas* v. *Adel*, 269 N. Y. 144, 146-7).

Even were it otherwise, it would be an idle gesture to serve respondent with an order to show cause. Respondent has been fully advised of the specifications upon which this application is based and has been represented by counsel at all stages of the proceedings herein. Respondent and counsel have appeared in this proceeding on five different days, over the period of a month. There have been hearings, at which respondent vigorously urged defenses of law, and made no attempt to controvert any of the material facts herein. Briefs have been submitted by both parties. Consequently, the statutory requirements (Judiciary Law, §751) applicable to criminal contempts not committed in the view and presence of the court have been satisfied (*Spector* v. *Allen*, 281 N. Y. 251).

It is therefore my conclusion that respondent witness was not justified in refusing to answer the questions put to him, and that the application to punish him for contempt must be granted.

I sentence the defendant to the term of thirty (30) days in Civil Prison and fine him the sum of Two Hundred and Fifty Dollars ($250).

/s/ MITCHELL D. SCHWEITZER
Judge, Court of General Sessions.

Dated New York,
May 22, 1956.

Opinion of Markowitz, J.

SUPREME COURT,

SPECIAL TERM, NEW YORK COUNTY.

(N. Y. L. J., June 28, 1956, pg. 1, Col. 6.)

Knapp *v.* Schweitzer—This is an application, pursuant to article 78 of the Civil Practice Act, wherein petitioner seeks a review of the judgment of the Court of General Sessions, New York County, which held him in contempt of court pursuant to sections 750 and 751 of the Judiciary Law. Petitioner was sentenced to thirty days' imprisonment in the civil jail and to pay a fine of $250. The contempt adjudication is predicated upon petitioner's repeated refusal to answer certain questions asked of him, before the Third April Grand Jury of this county. Petitioner had been accorded immunity pursuant to Penal Law section 2447, and directed to answer by the said court. While the instant application is made under article 78 of the Civil Practice Act, by express statutory provision (Judiciary Law, section 752), petitioner also seeks relief in the nature of prohibition against both the judge (Schweitzer, J.) who committed him, and the District Attorney of New York County to prohibit any further proceedings in respect to the refusal to answer the questions put to him. The contentions of the relator were adequately and completely answered in the learned opinion of Judge Mitchell D. Schweitzer. The application is without merit. Accordingly, the petition is denied in all respects and is dismissed. Settle order.

Opinion.

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

September 1956.

BERNARD BOTEIN, J. P.,
BENJAMIN J. RABIN,
JOSEPH A. COX,
MARTIN M. FRANK,
FRANCIS BERGAN, JJ.

[SAME TITLE.]

Appeal from order of the Supreme Court at Special Term (Markowitz, J.) entered July 3, 1956 in the New York County Clerk's office dismissing petition to review judgment of the Court of General Sessions, New York County, adjudging petitioner in contempt, sentencing him to jail and payment of fine, for failure to answer questions before Grand Jury on assertion of claim of privilege against self incrimination.

BERNARD H. FITZPATRICK, of counsel (WILLIAM J. KEATING with him on the brief; WILLIAM J. KEATING and BUTLER, BENNETT & FITZPATRICK, attorneys) for Appellant.

ALBERT P. LOENING, JR., Assistant District Attorney, of counsel (CHARLES W. MANNING, Assistant District Attorney, with him on the brief; FRANK S. HOGAN, District Attorney, attorney) for Respondents.

BERGAN, J.:

Petitioner, Milton Knapp, has been committed for contempt by the Court of General Sessions for failure to answer questions before the New York County Grand Jury.

He is a co-partner of Eagle Reel and Manufacturing Co., which is engaged in interstate commerce. The employees of the firm are organized by Local 239 of the International Brotherhood of Teamsters.

The subject on which the Grand Jury inquiry was being prosecuted and in which the testimony of petitioner was sought to be elicited was whether the crime of bribing labor representatives, under Penal Law, §380; of conspiracy, under §580; and of extortion, under §850, had been committed.

When called before the Grand Jury on April 23, 1956, petitioner asserted his privilege against self-incrimination. This privilege is preserved by the New York Constitution (Article I, §6). He was required, nevertheless by the Grand Jury on a later date to answer the questions directed to him and upon this mandate he acquired, and was expressly given by the Grand Jury, an immunity co-extensive with the operational effect of New York law. (Penal Law, §2447; Cf. *People* v. *De Feo*, 308 N. Y. 595).

Petitioner thereupon asserted that although the statute regulating immunity in New York would protect him against prosecution in this State based on his testimony, answers elicited under compulsion of New York authority would incriminate him under Federal law which makes unlawful, among other things, the payment of money by an employer to any representative of his employees in an industry affecting commerce (29 U. S. C., §186). He thereupon persisted in refusal to answer the questions before the Grand Jury and was held in contempt by the Court of General Sessions.

This is an Article 78 proceeding against the judge presiding at the General Sessions at which petitioner was held in contempt and against the District Attorney of New York County in the nature of prohibition. The amended answer pleads matters largely in the nature of defenses of law; and a reply served by the petitioner contains an affirmative pleading that the "reality of petitioner's danger of self-incrimination" under provisions of the Federal Labor Management Relations Act is based on the public

announcement of the United States Attorney of the Southern District of New York of an intention "to cooperate with the District Attorney of New York County in the prosecution of criminal cases in the field of the subject matter out of which petitioner's commitment arose". This reply further alleges that the respondent District Attorney "intends to cooperate with" the United States Attorney "in the prosecution of such criminal cases in the courts of the United States".

Since the court at Special Term disposed of these issues summarily without trial and by a dismissal of the petition which carried with it a dismissal of the reply as being insufficient, we are required to accept as true upon this appeal the factual allegations of the reply in respect of the cooperation between Federal and State prosecuting officers in this area of criminal responsibility occupied both by Federal and State governments within their respective statutory enactments. (*Matter of Doherty* v. *McElligott*, 258 App. Div. 257, 258, 260).

We therefore are required to begin the consideration of the question raised by the petitioner by accepting as a demonstrated fact in the record before us the actual cooperative policy between the appropriate Federal and State authorities in prosecuting crimes arising from acts made criminal both by Congress and by the New York Legislature and concerning which the petitioner's testimony is sought to be compelled.

If the literal logic of some of the decided cases be carried to the ultimate it would seemingly be quite possible for a State prosecuting authority to obtain a direction to compel a witness to incriminate himself upon granting a State immunity and for this to be followed by a Federal prosecution for the act disclosed under compulsion; and, indeed, with the compelled testimony used in support of the Federal charge.

But the full implications of such a concave view of constitutional privilege have not been faced, and the cases which have called up discussion of the question have not required that this ultimate question be decided. In the

margin of decision the view sometimes has been expressed that the possibility of Federal prosecution upon the compelled State disclosure has been remote or unlikely.

The complex and delicately adjusted balance of sovereignties between Federal and State governments presupposes a related measure of responsibility for each. Each is bound by identical constitutional restraints. The State has its function under the United States Constitution as well as the Federal government; and they have extremely close and continuous relations with each other. We are not here treating of sovereign strangers but of inseparable sovereigns of the same fibre and substance.

The cases of different sovereign jurisdictions decided under English law and sometimes cited in American cases on this subject, seem to us to have only illustrative or peripheral relation to the precise American constitutional problem of what ought to happen when a State compels criminal self-incrimination in an area of actual exposure of the witness to prosecution under effective and operative Federal criminal law. Examples of the often cited English cases which hold the British court will not protect witnesses against violation of the law of "another country" are *King of the Two Sicilies* v. *Willcox* (7 State Trials, N. S. 1050, 1068; *Queen* v. *Boyes* (1 B. & S. 311, 330). (*Cf. United States* v. *Murdock*, 284 U. S. 141, 149).

The States of the United States certainly are not "other countries" in relation to the Federal government. Federalism as we have developed it does not exist in airtight compartments of sovereign power; both general and state governments spread together over the same land and embrace the same people.

The whole tenor of constitutional law as developed in the courts of the United States suggests that a witness compelled by a State to testify against himself in a criminal case also affected by Federal law, where the Federal prosecuting authorities have knowledge of the State proceedings, and especially where they cooperate in those proceedings, will be protected fully by the judicial power of the

United States against the adverse effects of such compulsion on subsequent Federal prosecution.

The usual rule is, of course, that the United States will not deem itself bound not to prosecute because of unilateral exercise of compulsion to self-incrimination by a State; and this in part on the ground that the general government will not be restrained in its policy by local action taken by a State government. The principle is illustrated in *Feldman* v. *United States* (322 U. S. 487) in which Mr. Justice Frankfurter noted that "a State cannot by operating within its constitutional powers restrict the operations of the National Government within its sphere" (p. 490). See also *Jack* v. *Kansas* (199 U. S. 372, 380).

But in some of the decisions on the subject which preceded *Feldman* v. *United States* the court regarded the risk of Federal prosecution arising from State compulsion as distant and remote; and this conception is in the overtone of the opinions as suggesting by mere remoteness a safeguard enough for the case actually presented. In *Jack* v. *Kansas*, for example, in dealing with an argument in objection to a State immunity statute that it did not protect against Federal prosecution in the same field, Mr. Justice Peckham agreed with the Supreme Court of Kansas that the danger that Federal prosecution "would ever take place" was "so unsubstantial and remote" that it was unnecessary, and of course not possible, for the State to provide against it.

"We do not believe that in such case there is any real danger of a Federal prosecution, or that such evidence would be availed of by the government for such purpose" (p. 382). In dealing with the inability of the State to prevent prosecution of the same party for a Federal violation the court interpolated the comment "if it could be imagined that such prosecution would be instituted in such circumstances" (p. 380).

In dealing with its own immunity statutes, the United States has been able to give a simple and summary answer to the assertion that Federal immunity does not safeguard the witness against State prosecution based on his testi-

mony. The supremacy of the general government is asserted. (*United States* v. *Murdock, supra; Hale* v. *Henkel*, 201 U. S. 43). The converse problem posed by the inability of a State to assure immunity against Federal prosecution is at once more subtle and more difficult of adequate solution which would seem to hang some measure of cooperation, administrative or judicial, between the two governments.

The opinion in *Feldman* v. *United States* makes it clear that the complete non-participation of Federal authorities in the private proceedings in the New York State court which elicited the incriminating testimony was an important element which led to the permitted use of such testimony in the United States court.

If a Federal agency "were to use a State court as an instrument for compelling disclosures for federal purposes" the policy of the courts of the United States would be to protect the witness "against such an evasive disregard of the privilege against self-incrimination" (p. 494). Moreover, the court was of opinion that there was "no complicity" between private parties obtaining the incriminatory testimony in the State court "and federal law-enforcing officers" (p. 492).

Although some of the restraints imposed by the first eight amendments of the Constitution of the United States on the Federal government have now an impact upon the States by virtue of the reflected due process and equal protection requirements of the Fourteenth Amendment (*Board of Education* v. *Barnette* (319 U. S. 624)), it is an interesting commentary on constitutional development in the United States that the prohibition on self-incrimination in the Fifth Amendment is not by mirrored force of the Fourteenth Amendment held to be binding on the States. (*Adamson* v. *California*, 332 U. S. 46; *Palko* v. *Connecticut*, 302 U. S. 31; *Twining* v. *New Jersey*, 211 U. S. 78); although the historically closely related protection against the effect of a confession elicited by extra-judicial force is protected by the Fourteenth Amendment (*Lee* v. *Mississippi*, 332 U. S. 742).

But although the Fourteenth Amendment also does not operate to prevent, for example, unreasonable searches and seizures by a State government (*Wolf* v. *Colorado*, 338 U. S. 25) nevertheless the active participation of officers of the United States in a state-initiated search and seizure will effectively bar the reception of such evidence in the Federal courts within the operative effect of the United States Constitution (*Byars* v. *United States*, 273 U. S. 28).

"We cannot avoid the conclusion," said Mr. Justice Sutherland, "that the participation of the agent in the search was under color of his federal office and that the search in substance and effect was a joint operation of local and federal officers" (p. 33). The Federal government has the right to use evidence improperly seized by State officers "operating entirely on their own account," but the "rule is otherwise when the Federal government * * * participates" in the wrongful seizure.

It is not difficult from this to analogize joint cooperation of State and Federal authorities, or the participation of Federal authorities by cooperation with State officers, in elicitation of compulsory incriminating testimony so that it will result in the protection of the Fifth Amendment in a subsequent criminal prosecution based on such testimony. In *Burdeau* v. *McDowell* (256 U. S. 465) which considered the effect of both the Fourth and Fifth Amendments on papers seized, the court was careful to note that "no official of the Federal government had anything to do with" the taking of the property in question (p. 475).

While the restraint of the Fifth Amendment does not directly touch our judicial processes, we in New York have our own constitutional provision in the same spirit and in the same language (N. Y. Const., Art. I, 6), and we are bound as far as our strength permits to give it effect.

We are not able to assure protection against a Federal prosecution using the self-incriminatory testimony we compel against objection and for which we give a State immunity, and the validity of our immunity statute does not depend on our ability to secure the witness against Federal prosecution (*Dunham* v. *Ottinger*, 243 N. Y. 423).

But we cannot in fair compliance with our own Constitution remain insensible to the actual dangers of non-immunized compulsory incrimination in the United States courts where we compel testimony in the ever-broadening areas and in subjects affected by the criminal laws of both governments. And while we can exercise no control over Federal practice, we can exercise a judicial supervision over State enforcement officers.

A State prosecuting officer investigating an area in which the criminal laws of both the Federal and State governments operate together, and requiring immunized testimony in the development of his case, could himself give adequacy to State constitutional safeguards by tendering cooperation with the appropriate United States attorney.

If the cooperation were accepted by the Federal government we have no doubt that within *Feldman* v. *United States, Byars* v. *United States* and *Burdeau* v. *McDowell* (*supra*), the courts of the United States would afford adequate safeguards to the witness. Such safeguards would strengthen the confidence with which a State might undertake to compel self-incriminating testimony where duality of criminal law might be operative; and it would tend to assure the adequacy of State constitutional guaranties binding alike on State prosecutors and State courts.

When to seek such cooperation and when to proceed without it would, in the nature of things, rest in the conscience and judgment of the district attorney, who would act in consonance with the spirit of the New York Constitution. The solution, at bottom, lies in cooperation in good faith between the two governments and their judicial and prosecuting establishments, both of which live in quite the same tradition.

Assuming, as we do in this case, from the undisputed allegation of the public announcement of cooperation by the United States attorney with the district attorney, and the undisputed allegation of intention by the district attorney to cooperate with the United States attorney, that the fact of cooperation is true and that the instant inquiry is

embraced within it, adequate protection under the Federal decisions would have inured to the petitioner.

The United States courts would not, of course, accept these pleadings as conclusive; but if Federal judicial inquiry disclosed the facts to be as they are here pleaded, the immunity that petitioner would gain under New York law would seem to extend to the residual risk of Federal prosecution. On the other hand, if it is not shown that the alleged cooperation and intent to cooperate did in fact exist, it would not appear that there is a real and substantial danger that the testimony compelled by the state will be used in a subsequent Federal prosecution.

The order should be affirmed without costs.

All concur.

Decision Amending Remittitur.

COURT OF APPEALS.

April 4, 1957.

Motion to amend remittitur granted. Return of remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon by the Court of Appeals questions under the Constitution of the United States, as follows: "1. In the course of an investigation by the Third April Grand Jury of New York County under Penal Law, Sections 380, 580 and 850 dealing with bribery of labor union representatives, conspiracy and extortion, appellant, an employer engaged in interstate commerce, declined to answer questions directed to the ascertainment of whether he had paid money to certain named officials of a labor union, Local 239, International Brotherhood of Teamsters, on the ground that the answers would tend to incriminate

him, citing particularly his peril under a Federal statute, Taft-Hartley Act, Section 302, 29 U. S. C. 186 regulating under penal sanction, payments to union representatives; and appellant was thereupon convicted of a contempt of the Court of General Sessions of said County against his contention that since the source of the peril of prosecution was Federal, he was privileged to decline to answer by virtue of the Fifth Amendment to the United States Constitution which binds the State Court Grand Jury through the Supremacy clause Article VI, Clause 2 as well as through the Privileges and Immunities Clause of the Fourteenth Amendment. This Court decided the stated contention adversely to appellant.

2. In the course of an investigation by the Third April Grand Jury of New York County proceeding under Penal Law, Sections 380, 580 and 850 dealing with bribery of labor union representatives, conspiracy and extortion, appellant, an employer engaged in interstate commerce, declined to answer questions directed to the ascertainment of whether he had paid money to certain named officials of a labor union, Local 239, International Brotherhood of Teamsters; and appellant was thereupon convicted of a contempt of the Court of General Sessions of said County against his contention that Taft-Hartley Act, Section 302, 29 U. S. C. 186, regulating payments by employers to labor union repsentatives, by preempting the field of regulations of such payments had rendered Penal Law Sections 380, 580, and 850, insofar as applied to industries affecting Commerce, repugnant to the Commerce (Article 1, Section 8) and Supremacy (Article VI Clause 2) Clauses of the United States Constitution and hence deprived the State Grand Jury of jurisdiction to make the stated inquiries. This Court decided the stated contention adversely to appellant."

APPENDIX B.

Statutes Involved.

A. Federal Statutes.

1. Labor Management Relations Act 1947 (Taft-Hartley Act) Sec. 302. 29 U. S. C. §186; 61 Stat. §157.

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

SEC. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not

be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in the event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other place as may be designated in such written agreement; and (C) such payments as are intended to be used

for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The District courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U. S. C., title 15, sec. 17, and title 29, sec. 52); and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U. S. C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

2. Constitution, Art. I, Section 8, Cl. 3.

"The Congress shall have Power . . .
To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

3. Constitution, Art. VI, Cl. 2.

"This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

4. Constitution, Amendment V.

"No person . . . shall be compelled in any criminal case to be a witness against himself, . . ."

5. Constitution, Amendment XIV, Section 1.

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . .

B. New York State Statutes.

6. New York Penal Law, Section 380.

"1. A person who gives or offers to give any money, property or other thing of value to any duly appointed representative of a labor organization with the intent to influence him in respect to any of his acts, decisions, or other duties as such representative, or to induce him to prevent or cause a strike by the employees of any person or corporation, is guilty of a misdemeanor.

2. Any duly appointed representative of a labor organization who solicits or accepts or agrees to accept from any person any money, property or other thing of value upon any agreement or understanding, express or implied, that he shall be influenced in respect to any of his acts, decisions, or other duties

as such representative, or upon any agreement or understanding, express or implied, that he shall refrain from causing or shall prevent a strike or work stoppage or any form of injury to any business, is guilty of a misdemeanor."*

3. (Grant of immunity.)

7. New York Penal Law, Section 850.

Extortion is the obtaining of property from another, or obtaining the property of a corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear, or under color of official right.

8. New York Penal Law, Section 580.

"If two or more persons conspire:

1. To commit a crime; or

2-6. . . .

Each of them is guilty of a misdemeanor."

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* An amendment of this subdivision effective September 1, 1956 extended to coverage to welfare fund trustees or representatives.

APPENDIX C.

Order Appealed from (Remittitur) with Amending Order.

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 8th day of March in the year of our Lord one thousand nine hundred and fifty-seven, before the Judges of said Court.

WITNESS,

The Hon. ALBERT CONWAY,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

Remittitur March 8, 1957.

No. 363.

IN THE MATTER
of
The Application of MILTON KNAPP,
Appellant,
for an Order &c.,
vs.
MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions, & ano., &c.,
Respondents.

BE IT REMEMBERED, That on the 12th day of December in the year of our Lord one thousand nine hundred and

fifty-six, Milton Knapp, the appellant in this cause, came here unto the Court of Appeals, by William J. Keating, and Butler, Bennett, Fitzpatrick & DeSio, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Mitchell D. Schweitzer, Judge of the Court of General Sessions, & ano., &c., the respondents in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Bernard H. Fitzpatrick, of counsel for the appellant and by Mr. Albert P. Loening, Jr., of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, March 8, 1957.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

[SEAL]

STATE OF NEW YORK

IN

COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the fourth day of April A. D. 1957.

PRESENT,

Hon. Albert Conway,
Chief Judge, presiding.

Mo. No. 154.

IN THE MATTER

of

The Application of MILTON KNAPP,
Appellant,

for an Order &c.,

vs.

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions, & ano., &c.,
Respondents.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted. Return of remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon by the Court of Appeals questions under the Constitution of the United States, as follows: "1. In the course of an investigation by the Third April Grand Jury of New York County under Penal Law, Sections 380, 580 and 850 dealing with bribery of labor union representatives, conspiracy and extortion, appellant, an employer engaged in interstate commerce, declined to answer questions directed to the ascertainment of whether he had paid money to certain named officials of a labor union, Local 239, International Brotherhood of Teamsters, on the ground that the answers would tend to incriminate him, citing particularly his peril under a Federal statute, Taft-Hartley Act, Section 302, 29 USC 186 regulating under penal sanction, payments to union representatives; and appellant was thereupon convicted of a contempt of the Court of General Sessions of said County against his contention that since the source of the peril of prosecution was Federal, he was privileged to decline to answer by virtue of the Fifth Amendment to the United States Constitution which binds the State Court Grand Jury through the Supremacy clause Article VI, Clause 2 as well as through the Privileges and Immunities Clause of the Fourteenth Amendment. This Court decided the stated contention adversely to appellant. 2. In the course of an investigation by the Third April Grand Jury of New York County proceeding under Penal Law, Sections 380, 580 and 850 dealing with bribery of labor union representatives, conspiracy and extortion, appellant, an employer engaged in interstate commerce, declined to answer questions directed to the ascertainment of whether he had paid money to certain

named officials of a labor union, Local 239, International Brotherhood of Teamsters; and appellant was thereupon convicted of a contempt of the Court of General Sessions of said County against his contention that Taft-Hartley Act, Section 302, 29 USC 186, regulating payments by employers to labor union representatives, by preempting the field of regulations of such payments had rendered Penal Law Sections 380, 580 and 850, insofar as applied to industries affecting Commerce, repugnant to the Commerce (Article 1 Section 8) and Supremacy (Article VI Clause 2) Clauses of the United States Constitution and hence deprived the State Grand Jury of jurisdiction to make the stated inquiries. This Court decided the stated contention adversely to appellant."

And the Supreme Court, New York County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

(SEAL)

No. 189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

MILTON KNAPP,

Appellant,

against

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions and FRANK S. HOGAN, District Attorney of the County of New York,

Appellees.

APPELLANT'S BRIEF ON MOTION TO DISMISS OR AFFIRM.

BERNARD H. FITZPATRICK,
Counsel for Appellant,
37 Wall Street,
New York 5, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

MILTON KNAPP,

Appellant,

against

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions and FRANK S. HOGAN, District Attorney of the County of New York,

Appellees.

APPELLANT'S BRIEF ON MOTION TO DISMISS OR AFFIRM.

Statement.

This motion to dismiss or affirm raises no ground for dismissal other than a claim of insubstantiality of the question.

Although two questions are sought to be brought before the Court upon this appeal, jurisdiction by appeal rests only on the question of Federal preemption, since that is the only question involving repugnancy of state statutes. It is worthy of note that no claim is made that a prior decision of this Court squarely disposes of the question of preemption adversely to Appellant's contention.

The following comments on the motion follow the Respondent's presentation *seriatim*, being limited, how-

ever, to the preemption question which is the foundation of the appeal.

Argument.

(Resp., p. 9) The phraseology "Subdivision (c) exempts certain types of payments not here relevant . . ." is an effort to de-emphasize a salient feature of Section 302 of the Taft-Hartley Act, namely, that it is a complete substantive regulation of the matter of payments between employers and representatives; complete in what it authorizes and complete in what it prohibits. This has a material bearing on the question of whether concurrent state regulation is permissible.

(Resp., p. 9) While the fact that the same act may be subjected to both state and federal penalties does not necessarily augur preemption, neither is it a benediction upon the power of a state to deal with matters upon which the Congress has spoken. It is to be noted that Section 302 of Taft-Hartley envisages, although perhaps not exclusively, the protection and integrity of a relationship created by Sections 7 and 9 of the NLRA. While it is recognized that the term "representative" as used in Section 302 is broader than the term as used in Sections 7 and 9*, nevertheless there remains the basic fact that Section 302 does comprehend representatives within the meaning of Sections 7 and 9 and the Respondent's argument thus involves, at least in part, a contention that the state may regulate a relationship of federal statutory creation.

In the *Zook*** case the relationship as such was not sought to be regulated; it was the absence of a federal relationship, i. e., the non-possession of an ICC Certificate, which

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* *U. S. v. Ryan* (1956), 350 U. S. 299.

** *California v. Zook* (1949), 336 U. S. 729.

was penalized. The *Zook* case would furnish an analogy here if the New York State statutes penalized such matters as receiving moneys upon a fraudulent claim that a person was in fact a representative. The New York statutes here in issue go beyond *Zook* in that they actually attempt to mandate a representative whose duties and tenure depend on federal statutes to observe a standard of conduct set up by New York in a matter for which the Congress has provided the standard.

While bribery is a subject which has been traditionally regulated by the criminal laws of the states, it must be recognized that the crime of bribery depends upon the existence of an official status which, in most cases, is created by the state. In the case at bar, the status is one which is created by the federal statute. It cannot be said of the case at bar, as is said in the counterfeiting cases* the violent picketing cases** and others, that a given course of conduct affects a particular state in an aspect not necessarily related to the federal delict; in the labor relations field, if a representative exacts or receives moneys for a dereliction of duty, the effect is upon federal labor relations and only upon federal labor relations, because the performance of the representative's duty is no concern of the state.

(Resp., p. 10) The resort by Respondent to the legislative history of the Act serves to point up the fact that the question tendered is, indeed, substantial. That a question is not resolvable upon the face of a statute demonstrates forcefully that it is a question of substance.

(Resp., p. 11) The quotation from *U. S.* v. *Brennan*† emphasizing the purpose of Section 302 to "preserve the integrity of the labor-management relationship by pro-

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* *U. S.* v. *Marigold*, 9 How. 560, 568, 569.

** *U. A. W.* v. *WERB* (1956), 351 U. S. 266.

† *U. S.* v. *Brennan*, D. C. Minn. (1955), 134 F. Supp. 42, 47.

hibiting bribery, extortion or any form of dishonesty . . ." serves to emphasize Appellant's position that the section is part and parcel of the complete plan of federal regulation of the labor-management relations field, the substance of which has, in every case since *Garner,* been held to be beyond the pale of state action.

(Resp., p. 11) The use of the phrase "coincidence means invalidity" is an attempt on the part of Respondent to oversimplify the contention of Appellant. The Appellant's contention is that "coincidence is as ineffective as opposition when Congress has taken the particular subject matter in hand."*

(Resp. p. 11) Respondent speaks of the absence of substantial conflict. Appellant has heretofore pointed out the potentialities of conflict, but in any event it is unnecessary that Appellant show conflict because that becomes relevant only where Congress has occupied but a limited portion of the field. The federal statutes here in issue so blanket the particular field as to leave nothing whatever to the states.

(Resp., p. 11) The citation of the Federal Anti-Racketeering Act (18 USC 1951) is inapposite, for by Section 3231 of Title 18, Congress has affirmatively disclaimed an intent to preempt the operation of state law. It is to be noted that Section 302 of the Taft-Hartley Act is not a part of Title 18.

(Resp., p. 12) The fact that the Grand Jury was investigating crimes of extortion and conspiracy as well as the crime of bribery does not detract from Appellant's position. Certainly the crime of extortion as limned by the facts in this case involves the payment of money by an employer to a labor representative; so does the crime of conspiracy.

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* *Charleston etc. R. Co.* v. *Varnville,* 237 U. S. 597, 604.

In sum, the question is novel and based upon novel Federal entrance into a segment of a field heretofore regulated only by the states. The remainder of the field has been held preempted by a solid line of decisions of this court. The state statutes claimed to be repugnant regulate identical aspects of identical conduct.

Conclusion.

The motion should be denied and a notation of probable jurisdiction entered.

Dated: New York,
July 30, 1957.

Respectfully submitted,

BERNARD H. FITZPATRICK,
Counsel for Appellant,
37 Wall Street,
New York, N. Y.

Of Counsel:
WILLIAM J. KEATING.

No. 189

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1957

MILTON KNAPP,

Petitioner,

against

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions and FRANK S. HOGAN, District Attorney of the County of New York,

Respondents.

BRIEF FOR PETITIONER.

BERNARD H. FITZPATRICK,
WILLIAM J. KEATING,
Counsel for Petitioner,
37 Wall Street,
New York 5, N. Y.

INDEX.

Cases Cited.

STATUTES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

MILTON KNAPP,

Petitioner,

against

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions and FRANK S. HOGAN, District Attorney of the County of New York,

Respondents.

PETITIONER'S BRIEF.

Certiorari granted upon dismissal of an appeal taken from a final order of the New York Court of Appeals affirming, as did the intermediate appellate court, an order of the New York Supreme Court, Special Term, New York County, denying and dismissing appellant's petition in a prerogative writ proceeding for review of (certiorari) and prohibition against a Mandate of the Court of General Sessions, New York County, imposing a fine upon appellant and committing him to jail for a criminal contempt of that court.

Opinions Below.

The New York Court of Appeals, 2 N. Y. 2nd 913, handed down no opinion but amended its remittitur to show the necessary decision of the two federal questions originally proposed for review 2 N. Y. 2d 975 (R. 103).

The New York Supreme Court, Appellate Division, First Department, per Bergan, J. rendered an opinion which is reported at 2 App. Div. 2d, 579 and also at 157 N. Y. Supp. 2d 158 (R. 93).

The New York Supreme Court, Special Term, New York County, Markowitz, J. rendered an opinion which is unreported (R. 90).

The Court of General Sessions of New York County, Schweitzer, J. rendered an opinion which is not officially reported but appears at 157 N. Y. Supp. 2nd 820 (R. 81).

Jurisdiction.

Jurisdiction was acquired by grant of certiorari (R. 104) under 28 U. S. C. §2103 upon dismissal of an appeal taken from an order of the Court of Appeals of the State of New York, the highest court of that State, which order was made March 8th, 1957 (R. 101). Notice of appeal to this Court was served and filed May 13th, 1957, after the Court of Appeals had, on April 4th amended its remittitur to show that it had decided adversely to Petitioner the question upon which certiorari has been granted (R. 103).

The question presented is reviewable by certiorari by virtue of the provisions of 28 U. S. C. §1257(3). The proceeding originated in the Court of General Sessions of New York County which, on May 22d, 1956, summarily convicted Petitioner of a criminal contempt for his refusal to answer questions directed to the ascertainment of whether he had paid money to certain named representatives of the labor union representing his employees. Petitioner, an employer in an industry affecting commerce, had been called as a witness before a Grand Jury appendant to the Court of General Sessions in the course of an investigation under New York Penal Law Sections 380, 580 and 850, which deal

with bribery of labor union representatives, conspiracy and extortion. Petitioner's refusal to answer was put upon the ground that the answers would tend to incriminate him under a Federal Statute, Taft-Hartley Act Section 302, 29 U. S. C. §186, regulating, under penal sanction, payments to union representatives. Petitioner contended that since the source of his peril was Federal, he was privileged to decline to answer by virtue of the Fifth Amendment to the United States Constitution which binds the state courts through the Supremacy Clause, Art. VI, Cl. 2, as well as through the Privileges and Immunities Clause of the Fourteenth Amendment.

Review by the State Supreme Court, Special Term, New York County, by the Appellate Division of the Supreme Court, and by the Court of Appeals of New York resulted in a series of affirmances of the conviction, the last of which is the order appealed from. An amendment of remittitur (R. 103) certifies that the question was entertained and decided by the high court of the State.

Petitioner was imprisoned on the day of the handing down of the original mandate, but was enlarged the following day without bail and remains enlarged pending the determination here by virtue of an order made by the Chief Judge of the Court below.

Question Presented.

Whether an employer in an industry affecting commerce, called before a Grand Jury of the State as a witness in the course of an investigation concerning the state penal offenses of bribery, extortion and conspiracy connected with labor union operations, is privileged, by the Fifth Amendment to the United States Constitution, to decline to answer questions of such character that affirm-

ative answers thereto would establish the *corpus* of the federal crime of unauthorized payment of moneys to an official of the labor union representing his employees, Taft-Hartley Act, Sec. 302 (29 U. S. C. 186; 61 Stat. 157); and whether his ensuing punishment for contempt by a State Court is not barred by the Supremacy Clause, Art. VI, Cl. 2 of the United States Constitution and also by the "Privileges and Immunities" Clause of the Fourteenth Amendment.

Statutes Involved.

Labor-Management Relations Act, 1947 (Taft-Hartley Act) Section 302, 29 U. S. C. §186, 61 Stat. §157: Constitution; Art. VI Cl. 2 (supremacy), Amendment V (self-incrimination), Amendment XIV, Section 1 (privileges and immunities).

The texts of the foregoing, so far as material, are as follows:

1. Labor Management Relations Act 1947 (Taft-Hartley Act) Sec. 302, 29 U. S. C. §186, 61 Stat. §157.

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

SEC. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

* * * * * *

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.'

* * * * * *

2. Constitution, Art. VI, Cl. 2.

> "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

3. Constitution, Amendment V.

> "No person . . . shall be compelled in any criminal case to be a witness against himself, . . ."

4. Constitution, Amendment XIV, Section 1.

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . .

Statement.

A. Proceedings in General Sessions.

The petitioner is a co-partner of Eagle Reel and Manufacturing Company, a Bronx (R. 26) concern, concededly (R. 53) engaged in interstate commerce. The manufacturing operations of Eagle Reel are organized by a labor organization known as Local 239, International Brotherhood of Teamsters of which one Phillip Goldberg (sometimes referred to as "Greenberg" in the record) and one Sam Goldstein are officials (R. 49, 50-51).

At the time comprehended by the questions (set out below) which petitioner declined to answer there existed

contractual relations between the employing firm and that local union covering the wages, hours and working conditions of the employees (R. 49-51).

The petitioner on April 23, 1956 appeared as a witness before the Third April Grand Jury of New York County and was asked a series of questions designed to elicit information as to payment of monies from appellant employer to Goldberg. He declined to answer on the ground that the answers might tend to incriminate him. Typical of the questions are the following (R. 12-13) which, if answered affirmatively, would establish the *corpus* of a violation of section 302 of the Labor Management Relations Act of 1947 (Taft-Hartley Act, 29 U. S. C. §186):

> "Q. Mr. Knapp, on or about October 28th, 1955, did you give Philip Goldberg, a representative of Local No. 239, International Brotherhood of Teamsters, the sum of $500"?
>
> "Q. Mr. Knapp, on or about October 28th, 1955, did you go to the Public National Bank and Trust Company at 149th Street and Prospect Avenue and cash this check, Grand Jury Exhibit Number One, and receive from the bank the sum of $500"?
>
> "Q. Mr. Knapp, on October 28th, 1955, were you accompanied by Phillip Goldberg, an official of Local No. 239, International Brotherhood of Teamsters, when you went to the Public National Bank and Trust Company, located at 149th Street and Prospect Avenue"?
>
> "Q. Isn't it a fact that Sam Goldstein is an official of Local No. 239, International Brotherhood of Teamsters"?
>
> "Q. Did you ever pay or give any sum of money to Samuel Goldstein"?

Thereafter the Grand Jury conferred immunity on the petitioner. The same questions were again put to him and he again asserted his privilege against self-incrimination.

Petitioner was resubpoenaed to appear before the Grand Jury on April 25, 1956, at which time the same questions were put to him. He continued to assert his privilege and was directed by the foreman to appear before the respondent, Honorable Mitchell D. Schweitzer, Judge of the Court of General Sessions (R. 17-23) in Part I of that court.

There the District Attorney made application for a direction by the Court to the petitioner to answer the questions put to him in the Grand Jury (R. 15). The application was founded upon a statement by the District Attorney that, "there is now pending" before the Grand Jury a John Doe investigation of conspiracy, bribery and extortion among labor officials. Respondent Judge Schweitzer directed petitioner to return to the Grand Jury on April 27 and answer the questions over the objection that the petitioner asserted his privilege in apprehension of a danger of admitting the *corpus* of a violation of the Taft-Hartley Act (R. 31-32):

The petitioner obeyed the direction to return to the Grand Jury but continued to assert his privilege and respectfully declined to answer the same questions. Thereupon the District Attorney again procured petitioner to appear on April 30th before respondent Judge Schweitzer, where the District Attorney moved the Court to punish the petitioner summarily for contempt.

At a continuance on May 21, 1956 counsel for petitioner summarized his opposition to the District Attorney's application to punish petitioner in four points, one of which (R. 67) was:

> "Second, the immunity conferred on the witness pursuant to Section 2447 is insufficiently broad in that it does not comprehend an immunity from prosecution under the applicable Federal statutes;"

The Court *viva voce,* expressly ruled on the self-incrimination question (R. 69).

On May 22 the Court adjudged petitioner guilty of contempt, sentenced him to confinement in the civil prison for a period of 30 days and fined him $250 (R. 76).

The opinion (R. 81) expressly rules (R. 89) on the question of incrimination in the Federal forum.

B. Proceedings in Special Term.

Following the commitment, petitioner applied to the Supreme Court, Special Term, New York County for review (certiorari) and prohibition under Article 78 of The New York Civil Practice Act (R. 3). The petition recited the partnership of petitioner in the Bronx firm, the involvement of the firm in interstate commerce, the organization of the plant by Local Union 239, the official status of Greenberg (Goldberg) in the Union and the existence of collective contractual relations between the Union and the Bronx firm, the appearance of petitioner as a witness before the Third April Grand Jury, the questioning of petitioner to elicit information as to payments to Greenberg, the assertion by petitioner of his privilege against self-incrimination, the conferring of immunity upon appellant by the Grand Jury and petitioner's subsequent adherence to his claim of privilege, the application of the respondent District Attorney before the respondent Judge for an instruction to the petitioner to answer and the direction to the petitioner to answer over the following objection *inter alia:*

> (b) That the grant of immunity pursuant to Section 2447 of the Penal Law is insufficiently broad in that it does not bar prosecution of the petitioner for violation of Section 302 of the Labor Management Relations Act of 1947 (R. 5).

The petition below goes on to recite petitioner's adherence to his refusal to answer, the application to punish him for contempt, the adjudication of contempt, and his com-

mitment. The petition concludes with an averment of initial application and a prayer for prohibition and review.

The amended answer (R. 7) raised no factual issue but denied the validity of the petitioner's objections to answering the questions, pleaded the legal insufficiency of the petition and prayed for denial and dismissal.

The reply (R. 8) set up *inter alia*, on the issue of petitioner's jeopardy in respect of Federal prosecution, that the Federal Prosecutor, Paul Williams, had publicly stated his intention to cooperate with the respondent District Attorney in the investigation of labor union bribery and extortion and that said respondent intended on his part to cooperate with the Federal Prosecutor.

No triable issue of fact appeared on the hearing and the Special Term, upon the pleadings and the minutes of General Sessions dismissed the petition and denied the same (R. 1). The memorandum opinion (R. 90) adopted the reasoning of the opinion in the Court of General Sessions.

C. Proceedings in Appellate Division.

On appeal taken to the Appellate Division, First Department, a unanimous order affirming the order of the Special Term was entered on November 27th, 1956, with opinion (R. 93) by Bergan, J. in which all concurred.

D. Proceedings in Court of Appeals.

The Court of Appeals affirmed without opinion by order (R. 101) of March 8th, 1957. However, it indicated, by order of April 4th, 1957 amending its remittitur, that it had necessarily entertained the question of the right, under the Fifth Amendment, of appellant to decline to answer and had decided it adversely to appellant (R. 103).

Summary of Argument.

New York has asked questions tending to establish the *corpus* of the federal crime of unauthorized payments to labor officials, petitioner's federal jeopardy is not remote but real; his refusal to answer is put upon that federal ground.

The Fifth Amendment confers on him at least the primary right to avoid federal prosecution springing from his own compelled testimony; ancillary to the primary right is the right to refuse to give testimony, and this right is independent of the function of the inquisitor. This ancillary right is a Federal right which states must respect.

Respondents rely on the "two sovereignties" doctrine. This doctrine is founded in part upon a misapprehension of the English doctrine as settled in *U. S.* v. *McRae*, and in part upon undue emphasis placed upon mere dicta found in *Brown* v. *Walker*, *Jack* v. *Kansas* and *Hale* v. *Henkel*. The doctrine that the first eight Amendments control only the action of the Federal Government is not so broad that there is not a negative duty in the states to refrain from preventing the citizen from obtaining the benefit of the Amendments as against the Federal Government.

The true doctrine is the doctrine of Federal Supremacy under which the judges of New York may not interfere with the right of petitioner against the Federal Government.

Petitioner's right against the Federal Government is a right of federal citizenship which is a privilege and an immunity protected by the Fourteenth Amendment.

Argument.

The Petitioner is an employer in an industry affecting commerce. In a New York State Court he was asked a series of questions designed to ascertain whether he has paid money to one Goldberg and to one Goldstein, who on the face of the questions, are sought to be identified as officials of the labor union which represents his employees.

A federal statute, Taft-Hartley Act, Section 302, makes it a misdemeanor (Subsection d):

> "... for any employer to pay ... any money to any representative of any of his employees who are employed in an industry affecting commerce."

A union official is a representative within the meaning of the misdemeanor.[1]

Petitioner declined to answer the questions upon the precise ground of exposure to self-incrimination under the cited portion of the Taft-Hartley Act, and for such refusal he stands convicted of contempt.

There can be no cavil about the reality of the Petitioner's jeopardy. The questions, if answered affirmatively, would establish the *corpus* of the federal crime. These are not penumbral questions; they raise dark and full blown the shadow of federal criminal conviction. There is here no limitation, and indeed, no possibilty of limitation, as there was in *Jack* v. *Kansas*[2] of the questions, or of their incriminating possibilities which would keep them without the ambit of the federal criminal law. Nor can the dalliance or official inertia or "sportsmanship" of the federal prosecutor be presumed upon, as in *Jack* v. *Kansas*, for the

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[1] *U. S.* v. *Ryan*, 350 U. S. 299.

[2] 199 U. S. 372.

record here shows a parallel effort on the part of the Federal Prosecutor concerned and the New York District Attorney to stamp out bribery of union officials. (R. 9, 99)

There is here no geographic remoteness nor extradition safeguard as in *King of Two Sicilies* v. *Willcox*;[3] nor an unimaginable use of a dormant legal weapon, as in *Queen* v. *Boyes*.[4] Nor was the instance court here without knowledge of law of the "other" jurisdiction, as in the *Willcox*[4a] case, for it was bound to take judicial notice of it.

Let it be observed also that Petitioner's testimony, if New York succeeds in extorting it from him, may not merely inspire the federal prosecution, but can, in that federal prosecution, be read against him verbatim.[5] Nor does the fact that New York has granted immunity to this Petitioner extinguish or make less remote the possibility of federal prosecution.[5a]

Faced with this tangible, proximate and undiminished peril of federal prosecution, petitioner asserts that he is protected in his refusal to answer by the Fifth Amendment.

> "No person . . . shall be compelled in any criminal case to be a witness against himself."

At the very least, this is a limitation on the Federal Government,[6] and by its terms a limitation on its prosecuting arm. It means, at minimum, that the citizen shall not be compelled

> "... in any [federal] criminal case ..."

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[3] 7 State Trials, N. S. 1050.

[4] 1 B. & S. 311.

[4a] Cf. *U. S.* v. *MacRae*, 3 L. R. Ch. App. 79 explaining and limiting *Willcox*. In the *MacRae* case, the criminating law appeared on the face of the pleadings.

[5] *Feldman* v. *U. S.*, 322 U. S. 487.

[5a] *Ibid.*

[6] *Barron* v. *Baltimore*, 7 Pet. 243.

to give incriminating testimony. The Amendment is not less than a guaranty to him of safety against federal prosecution inspired by or based upon testimony wrung from him by compulsion.

The primary right conferred by the Amendment is a right to avoid federal prosecution. The right does not exist where the danger apprehended is not a danger of prosecution[7] and the right abates with the danger of prosecution however that may occur; whether by grant of immunity,[8] by pardon,[9] by the running of the statute of limitations[10] or by former jeopardy.[11] But to produce an abatement of the right the abating event must be tailored to fit the danger of prosecution.[12]

The right then, is fundamentally a right to avoid a federal prosecution based upon compelled testimony. Only secondarily is it a right to decline to testify; the right to decline to testify is wholly ancillary to the right to avoid a prosecution stemming from the testimony.

This ancillary right to decline to testify is not confined to criminal prosecution wherein the witness is or is subject to being proceeded against. One need not be a defendant or prospective defendant to assert the right. A witness, as such, may claim the privilege. He may claim it in civil litigation.[13] He may claim it in administrative proceedings.[14] He may claim it before purely inquisitorial bodies

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[7] *Ullman* v. *U. S.*, 350 U. S. 422.

[8] *Hale* v. *Henkel*, 201 U. S. 43.

[9] *Brown* v. *Walker*, 161 U. S. 591.

[10] *Ibid.*

[11] *Ibid.*

[12] *Counselman* v. *Hitchcock*, 142 U. S. 547.

[13] *McCarthy* v. *Arndstein*, 266 U. S. 34.

[14] *Vajtauer* v. *Commissioner*, 273 U. S. 103.

such as Congressional Committees.[15] With sound reason, the law fears the creation of a tandem between inquisitor and prosecutor whereby a person may be compelled to feed the prosecutor to his own damnation.

It may thus safely be said that the right to decline to testify is independent of the function of the inquisitor. Be the function the adjustment of private rights, the restraint of the criminal, the dispatch of public business, the framing of new laws, it is all one so far as the Amendment is concerned—and all immaterial. The right is dependent on the proximity of prosecution and not upon the color of the inquisitor's robe. It is assertable even where

> ". . . the proceedings give no warrant for thinking [the inquisitorial body is] attempting or intending to try [an individual] at its bar or before its committee for any crime or wrongdoing.[16]

The 'right of silence' is no "brooding omnipresence"; detached from the operations of the Federal Government; it is a definite limitation addressed to the action of a definite group of federal officials whose function is the prosecution of breaches of federal statutes, and wholly dependent upon and ancillary to the possible action of that group of federal officials; it is dependent upon them and not upon the source of the inquisition.

The Petitioner here now asserts the ancillary right of silence in a forum not of the central government's creation, but one bound, none the less, by federal organic law. He asserts that ancillary right of silence for the protection of his primary right to avoid federal prosecution based on compelled testimony.

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[15] *Quinn* v. *U. S.*, 349 U. S. 155.

[16] *McGrain* v. *Daugherty*, 273 U. S. 135, 179-80.

What power lies in a state court as inquisitor which makes it superior to a Congressional Committee as inquisitor? Is not the same ancillary right involved? Does not the same primary right exist? And is not the ancillary right as federal in its origin as the primary right from which it springs? Is the state court, which has no prosecuting functions in the federal field, not on a par with a Congressional Committee which has no prosecuting functions? Or is it to be presumed that there is a closer nexus, a clearer channel of information between one arm of the federal government and another than between a state agency and a federal prosecutor, whereby the peril of the witness is increased?

The answer to these questions, say the respondents, is to be found in the so-called "two sovereignties" rule supposedly developed as to the matter of self-incrimination through such cases as *Brown* v. *Walker*,[17] *Jack* v. *Kansas*,[18] *Hale* v. *Henkel*,[19] *U. S.* v. *Murdock*[20] and *Feldman* v. *U. S.*[21] and recently, in another application (the related field of double jeopardy) so seriously questioned as to result in an affirmance by an equally divided Court. (*Bartkus* v. *Illinois*, No. 39 Oct. Term 1957 Decided January 6, 1958.) Petitioner respectfully asserts that the "two sovereignties" rule is a cumulus of fallacies at least as applied to the matter of self-incrimination.

Prior to the decision of *Brown* v. *Walker*, the only case decided by this Court involving federal-state relationships in the field of self-incrimination was *United States* v. *Saline Bank*, 1 Pet. 100, wherein a discovery sought in a federal

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[17] 161 U. S. 591.

[18] 199 U. S. 372.

[19] 201 U. S. 43.

[20] 284 U. S. 141.

[21] 322 U. S. 487.

court was held to be barred as calling for facts criminating under Virginia penal laws.

Brown v. *Walker* involved an objection that an immunity statute was not sufficiently broad to discharge the rights of a witness under the Fifth Amendment in that it did not encompass an immunity against crimes against the State of Pennsylvania. The majority (per Brown, J.), did not hold such an immunity unnecessary, but instead held the statute sufficiently broad to bar state prosecution:

> "... The act in question contains no suggestion that it is to be applied only to the Federal Courts. It declares broadly that ... 'no person shall be prosecuted ... for or on account of any transaction matter or thing, concerning which he may testify'."

Any residual risk of prosecution outside the federal jurisdiction was described, quoting *Queen* v. *Boyes*,[22] as an

> "... extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct."

and disposed of on the ground of remoteness. *Brown* v. *Walker* cannot properly be looked upon, therefore, as furnishing the root-stock for a "two sovereignties" doctrine.

Thus the rule stood until the 1905 term; the "two sovereignties" doctrine was no part of it. Proximity *vel* remoteness was the only consideration, the source of the peril, state or federal, was not a valid consideration. Then followed a series of three cryptic and, at least on the surface, mutually contradictory decisions, *Jack* v. *Kansas*,[23] *Ballman* v. *Fagin*[24] and *Hale* v. *Henkel*.[25]

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[22] 1 B. & S. 311; 21 Eng. Rep. 730.

[23] 199 U. S. 372.

[24] 200 U. S. 186.

[25] 201 U. S. 43.

Jack v. *Kansas* arose out of a state grand jury investigation into violations of its local anti-trust laws. The witness assailed the Kansas immunity statute as not affording protection against a Sherman Act prosecution. The Kansas courts, however, had held that inquiry into interstate transactions was not permissible and the record showed that the questions were, in fact, limited to local transactions. The majority, which included Holmes, said

> ". . . We do not believe that in such case there is any real danger of a federal prosecution, or that such evidence would be availed of by the Government for such purpose"

but followed up with the cryptic statement

> "We think the legal immunity is in regard to a prosecution in the same jurisdiction, and when that is fully given it is enough."

Why, having found that the record would not support a claim of federal incrimination, the Court should make the latter comment is puzzling. Still more puzzling is the use made of the *Jack* case by Holmes in *Ballman* v. *Fagin*, discussed *post*. The *Jack* case is the only case to be entertained by this Court, prior to the case at bar, in which a claim of federal incrimination was asserted in a state court.

Ballman v. *Fagin*[26] was decided later in the same term. It held that a witness before a federal grand jury was protected in refusing to testify as to matters criminating under the bucket-shop statutes of Ohio; thus reasserting the *Saline Bank* rule. The opinion by Holmes cites *Jack* v. *Kansas* in support of the ruling, obviously interpreting that case as not supporting the "two sovereignties" doctrine.

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[26] 200 U. S. 186.

Hale v. *Henkel* was argued at the same term. The major issue was the application of the privilege to corporations, but it was also contended that a corporate officer need not produce books and records before a federal grand jury when such evidence would tend to incriminate him under state law. The majority, without mentioning *Ballman* v. *Fagin*, disposed of the issue thusly:

> "The further suggestion that the statute offers no immunity from prosecution in the state courts was fully considered in *Brown* v. *Walker* and held to be no answer. The converse of this was also decided in Jack *v.* Kansas . . . namely, that the fact that an immunity granted to a witness under a state statute would not prevent a prosecution of such witness for a violation of a Federal statute, did not invalidate such statute under the Fourteenth Amendment. It was held . . . that the possibility that information given by the witness might be used under the Federal act did not operate as a reason for permitting the witness to refuse to answer. . . . The question has been fully considered in England, and the conclusion reached by the courts of that country that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty. . . ."

The reference to *Brown* v. *Walker*, while literally true, is made to carry the implication that the Federal Government has no concern about the possibility of state prosecution whereas the case actually rested on the supremacy clause.[27] And while *Jack* v. *Kansas* is, in result, a converse holding, considered in the light of its citation in the *Ballman* case, it falls short of holding that the state is unconcerned about the possibility of federal incrimination. To these errors

[27] An interpretation reaffirmed in *Ullman* v. *U. S.*, 350 U. S. 422.

of implication, there is added a misunderstanding of the English rule.[28] Curiously, the dissenting Justices, Brewer and Fuller, were under the impression that the majority has held merely that

> ". . . the immunity granted by the Federal statute is sufficient protection against both the Nation and the several states."

The next step in the development of the "two sovereignties" doctrine was taken in *U. S.* v. *Murdock*.[29] This was an indictment for wilful failure to furnish income tax information, against which a special plea had been filed setting up an exposure to incrimination under the gambling and possibly the bribery laws of Illinois. This Court, sustaining a demurrer to the plea, said

> "The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."

Incongruously, however, it also relied on the supremacy clause:

> "Investigations for federal purposes may not be prevented by matters depending upon state law. Const. art. 6 §2."

The case repeats the error of *Hale* v. *Henkel* respecting the English law.

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[28] The quotation is based on *King of the Two Sicilies* v. *Willcox*, 7 State Trials (N. S.) 1050, which was limited to its own peculiar facts by the decision in *United States* v. *McRae*, L. R. 3 Ch. App. 79 holding that an exposure to forfeiture by the law of the United States was a good plea in bar to an English discovery proceeding.

[29] 284 U. S. 141.

In *Feldman v. United States,*[30] a mail fraud defendant was convicted in a Federal court upon evidence of a check "kiting" scheme given by him under compulsion of a state immunity provision in a New York statutory creditors proceeding. If the holding is limited to deciding that New York could not by its immunity statute, immobilize a federal prosecution or control the evidence therein there is little question of its soundness. But the majority opinion seems to hold state and nation to be as far apart as England and Sicily for testimonial purposes. It leans heavily on the

> "... settled principle of our Constitution ... that these (ten) Amendments protect only against invasion of civil liberties by the Government whose conduct they alone limit."

ignoring the obvious limitation that insofar as these Amendments create Federal rights in individuals, they impose the negative duty on states to refrain from interfering with individuals in the exercise of those rights.

> *Lyon* v. *Mutual etc. Ass'n.*, 305 U. S. 484;
> *United States* v. *Cruikshank*, 92 U. S. 542.

It further employs the questionable implications of *Jack* v. *Kansas, Hale* v. *Henkel* and *Murdock*, and subordinates the supremacy and remoteness grounds on which *Brown* v. *Walker* rested to the illustrative reference to "other sovereignty" contained in the language.

It should be remarked that the *Feldman* case is not dispositive of the issue in the case at bar. Feldman had not taken the one remedy open to him—that of resisting in the New York courts the disclosure of facts constituting a federal crime against which the New York statute could not immunize him. In the sense that he had not properly

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[30] 322 U. S. 487.

resisted New York's questions, he was not compelled to answer. It is one thing to hold New York's immunity unavailing; it is quite another thing to hold that New York may compel the giving of evidence of federal crime.

It is respectfully submitted that the "two sovereignties" doctrine is error. It is error in that it is founded in part upon a concept of the common law rule which is a false concept. It is error in that it is founded upon a misemphasized interpretation of *Brown* v. *Walker*. It is error in that it is founded upon a tunnel-visioned construction of *Barron* v. *Baltimore*. It is error in that it ignores the nature of the right conferred by the Fifth Amendment. It is error in that it ignores the supremacy clause and its application in testimonial matters.

The true rule is not the "two sovereignties" rule but the rule of Federal supremacy, leaving to Congress and to the states the adjustment of such immunities as are necessary and expedient for the accomplishment of their proper social objectives, but respecting rights derived from the Federal Constitution to the extent that they are not displaced by proper immunities.

The right claimed by Petitioner here is a right deriving directly from the Fifth Amendment, the supreme law of the land. It is based on a primary right to avoid a federal prosecution springing from or furthered by his own compelled testimony. Ancillary to that primary right, is the right of silence, limited, of course, to the facts of federal import. As the primary right is federal, so the derivative right of silence is federal. As a federal right, the right of silence respecting federal crime is protected by the supremacy clause and the judges of New York are bound not to dishonor it.

The framers of the Ten Amendments, it may be conceded, were not writing a super-constitution for the states.

But neither were they giving the citizen a shield against the acts of the federal government which could be stripped from him by the states in pursuit of their own ends. New York here seeks to strip this Petitioner of his shield against a federal prosecutor.

The Court will note that this argument in no wise questions the doctrine of *Twining* v. *New Jersey*[31] and *Adamson* v. *California*.[32] No general claim is made that the Fourteenth Amendment fastened upon the states the obligation to observe the restrictions of the Bill of Rights. If the questions here related solely to state-created offenses, as did the matters included in *Twining* and *Adamson*, Petitioner's position would be untenable, for his claim rests solely upon his rights vis-a-vis the Federal Government.

Nonetheless, there is a sense in which the Fourteenth Amendment is applicable here. Petitioner, not as a citizen of New York, but as a federal citizen, has a right of silence referrable to a federal prosecution. This would be a privilege or immunity of a citizen of the United States as such, which no state may abridge. The right is one of that limited class arising

> "... out of the nature and essential character of the federal government and granted or secured by the Constitution."[33]

Petitioner is in an anomalous and mystifying situation brought about by the divorce of law from realism and its casual flirtation with mere words. He stands between two governments each solemnly chanting that it is evil to convict upon extorted testimony while one seeks to

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[31] 211 U. S. 78.

[32] 332 U. S. 46.

[33] *Duncan* v. *Missouri*, 152 U. S. 382; *Slaughterhouse* Cases 16 Wall. 36.

extort and the other stands ready to use the extorted testimony to convict. Well might he say, "Thou hypocrites!".

Conclusion.

The order appealed from should be reversed and the cause remanded for vacatur of the mandate of commitment.

Dated New York, January 15, 1958.

Respectfully submitted,

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No. 189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

MILTON KNAPP,

Petitioner.

against

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions and FRANK S. HOGAN, District Attorney of the County of New York,

Respondents.

REPLY BRIEF FOR PETITIONER.

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INDEX.

STATUTES.

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REPLY BRIEF FOR PETITIONER.

Topics of Respondents' Arguments.

Statement.

Examination of Respondents' brief shows that argumentation is grouped around three propositions which may be stated, grossly, as follows:

1. New York's immunity statutes fully discharge New York's obligation to petitioner, if any, under the Fifth Amendment under a dual sovereignty (R. B., pp. 12-16).

2. A peril under the laws of a different sovereignty is so remote that it may be disregarded (R. B., pp. 16-19).

3. New York's action is not controlled by the Fifth Amendment (R. B., pp. 19-24).

This reply brief will deal with the propositions in the order of their gravity, viz:

1. Application of the Fifth Amendment.

2. New York's Immunity Statutes; Dual Sovereignty.

3. Proximity of the Peril.

ARGUMENT.

1. Application of the Fifth Amendment (pp. 19-24)

A. Relationship of Supremacy Clause. (pp. 19-20)

Respondent's counsel begins his argument by stating an "axiom" that

> ". . . [the Fifth] Amendment, as a part of the Bill of Rights, is not applicable to or controlling upon the states."

from which he derives the conclusion that the only claim of constitutional deprivation that can be made is a claim under the Fourteenth Amendment.

The "axiom" which forms the major premise is stated in terms more comprehensive than warranted by the decided cases, and the conclusion is faulty because it fails to exhaust the possibilities.

Turning first to the "axiom", there have been two views urged concerning the application of the Federal Bill of Rights to the states. One of these regards the Bill as furnishing to the citizen as against state action, whether or not solely concerned with the purely domestic affairs of the state, protections precisely in accord with the enumerated items of the Bill of Rights. That is to say that the states are bound to parallel in substance and procedural detail,

in all cases, the strictures of the Bill of Rights. This view of parallelism was asserted without success both before[1] and after[2] the advent of the Fourteenth Amendment.

Less comprehensive than the view of parallelism is the notion that in a divided sovereignty, the allocation of certain functions to one or the other government produces a corresponding division of the rights and obligations of the citizen; the right associated with a particular function following that function and that the Bill of Rights protects the citizen in such of his activities as relate to the functions assigned to the Federal Government.[2a]

This functional view is the view sustained in *Crandall* v. *Nevada*[3] against state action in the form of a taxing act restrictive of passenger transit out of Nevada. Several Federal functions were involved: among them, one protected by the First Amendment, viz. the right "to petition the [Federal] Government".

In the very decision which rejected the view of parallelism, sought to be vitalized under the Fourteenth Amend-

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[1] *Barron* v. *Baltimore*, 7 Pet. 243.

[2] Slaughterhouse cases 16 Wall. 36.

[2a] A still more restricted view was expressed in *Maxwell* v. *Dow*, 176 U. S. 581 i.e. that only strict rights of citizenship (excluding rights applicable to all persons) are comprehended by the "privileges and immunities" clause. This restricted view appears in no other place and it would seem to contradict both the definition of privileges and immunities given in the *Slaughterhouse* cases and the examination of them in that decision. This restricted view, so far as this counsel can see, protects only such rights as the right to run for Congress. It would seem quite incongruous for the framers of the Fourteenth Amendment to have used the words in any sense less than that of the full rights of the citizen comprehending not only those rights given to non-citizens but also those depending on the citizenship status as such. The language is aggregative or it is empty.

[3] 6 Wall. 35 (1868). The case was not decided under the Fourteenth Amendment, but it was later cited in the Slaughterhouse Cases as partially enumerative of 'privileges and immunities of citizens of the United States.'

ment, the *Slaughterhouse Cases*,[4] there is an enumeration of rights "which no state can abridge" founded upon the functional view; rights which "owe their existence to the federal government, its national character, its Constitution or its laws."

> "One of these is well described in the case of Crandall *v.* Nevada, 6 Wall. 36. It is said to be the right of the citizen of this great country, protected by implied guaranties of its Constitution, 'to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justice in the several states.' And quoting from the language of Chief Justice Taney in another case, it is said 'that for all the great purposes for which the federal government was established, we are one people, with one common country, we are all citizens of the United States;' and it is, as such citizens, that their rights are supported in this court in Crandall *v.* Nevada."
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> "Another privilege of a citizen of the United States is to demand the care and protection of the federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the

[4] 16 Wall. 36.

territory of the several states, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a state. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any state of the Union by a bona fide residence therein, with the same rights as other citizens of that state. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, * * *."

Crandall v. *Nevada* refers aptly to these rights as

"* * * independent of the will of any state * * *"

Now, in the case at bar, Petitioner is a functionary in interstate commerce;[5] Congress has the function of regulating that commerce, and has exercised it by making certain conduct a crime within the cognizance of the federal judiciary, which by the Constitution has the function of hearing and determining the same. Because as a functionary in commerce he is exposed to federal criminal prosecution, the Fifth Amendment has thrown about him a cordon of protection in any federal prosecution which may result; it has provided *inter alia* that in such case he may not be compelled to be a witness against himself. This protection exists because he engaged in a function, commerce, within the ambit of federal control, and thereby exposed himself to federal regulation. Clearly his primary right springs out of the "national character", "the Constitution" and "the laws" not of New York, but of the United States.

Respondent's "axiom" therefore is supportable only to the extent that it embraces the rejected view of parallelism;

[5] Second Employees' Liability Cases 233 U. S. 1.

the states are not furnished a ready made Bill of Rights for application to matters of their several domestic concerns. The "axiom" is insupportable to the extent that it embraces the accepted view of functionalism; the states are bound by the Bill of Rights where the particular right of the individual hinges upon his relationship to the Federal Government. This latter is true, it may be noted, whether or not the right involves "due process"; the right need not be "fundamental", it need only be federal.

Even less can be said in favor of Respondent's conclusion than can be said in favor of his "axiomatic" premise. For it is obvious that the Fourteenth Amendment does not furnish the sole basis for control of state action in respect of the Bill of Rights; if a right is federal, the Supremacy Clause may also bear upon state action. Indeed, a popular criticism of the *Slaughterhouse Cases* was that the decision reduced the scope of the "privileges and immunities clause" so that it achieved nothing that would not have been achieved by the Supremacy Clause *ex proprio vigore*. Without exploring the abstract question of whether the two are co-terminous in effect, we may observe that a very large range of concomitance necessarily exists.[6]

It is true, of course, that not every item of the Federal Bill of Rights creates rights of a type with which the usual run of state action will interfere; this is so because the Bill is aimed primarily at control of federal agencies. But with those rights, suited as they are to the action of federal agencies, there can, under the Supremacy Clause, be no state interference.[7] If a state, for example, laid a

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[6] Cf. *Crandall* v. *Nevada*, 6 Wall. 35, which rested solely upon the Supremacy Clause and the reference in the *Slaughterhouse Cases* 16 Wall. 36, to the rights therein described as "privileges and immunities".

[7] *Lyon* v. *Mutual etc. Assn.*, 305 U. S. 484.

tax upon a demand for federal jury trial or attempted to make a federal offense unbailable or commanded those subpoenaed as witnesses on behalf of a defendant in a federal criminal trial to refrain from attending or testifying, there would be little doubt of the invalidity of the state's action, even if the Fourteenth Amendment had never been enacted. Otherwise, as was said of the Nullification Acts of South Carolina,

> "... a State would have nothing more to do than to declare an act a felony or misdemeanor, to nullify all the laws of the Union."[8]

And it would make no difference whether the citizen claimed under the Bill of Rights or under similar provisions elsewhere in the Constitution. Marshall Neagle, for example could not be denied the privilege of the writ of *habeas corpus* by California laws governing murder.[9]

Respondent's proposition that no item embraced in the Bill of Rights restricts state action unless it violates due process is, hence, a fallacy.

B. Due Process (pp. 20-21).

The Court will observe that Petitioner did not raise the issue of due process in the original brief. But it is now raised by Respondent with the assertion that that is the only route by which the action of New York in the case at bar can be controlled. Petitioner now feels free to meet the issue.

Respondents rely upon *Twining* v. *New Jersey*[10], *Adamson* v. *California*[11] and *Snyder* v. *Massachusetts*[12] to demon-

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[8] Statement on the Removal Act of 1833 by the chairman of the Judiciary, quoted from Tennessee and Davis 100 U. S. 257.

[9] *Ex Parte Neagle*, 135 U. S. 1.

[10] 291 U. S. 97.

[11] 332 U. S. 46.

[12] 211 U. S. 78.

strate that a question of self incrimination does not involve a question of due process. It may well be that not every question of self-incrimination involves a question of due process, a matter which neet not here be examined. None of the three cited cases, however, involved compulsion to testify; *Twining* and *Adamson* involved merely inferences drawn by prosecutors from refusal to testify and *Snyder* involved the absence of defendant during a jury view of the scene of the crime.

But in *Brown* v. *Mississippi*,[13] it was held that compulsion to confess a crime was a violation of due process, the compulsion applied in that case being physical torture. Thus it is established that compulsion to confess gives rise to a question of due process, and that question here devolves into an examination of whether the substitution of a judge who threatens imprisonment for a deputy sheriff who threatens with a belt buckle removes the case from the rules of due process.

Neither on principle nor on an historical basis can such a distinction be made. The compulsion here sought to be exercised from the judicial bench is not the mere social compulsion or employment detriment referred to in the *Ullman* case;[14] it is the command "confess or forfeit your liberty"! And while the place of confinement may be more (or less) enjoyable than the Tower of London, a question of due process can hardly hinge upon the place of confinement: "*aut imprisonetur*"[15] is a phrase of unlimited application.

Certainly the fact that the compulsion is applied by the judicial department rather than by the executive depart-

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[13] 297 U. S. 278.

[14] 350 U. S. 422.

[15] Magna Carta, Art. 39.

ment of the government renders it no more palatable.[16] The framers of the Fifth Amendment directed the self-incrimination provision primarily at judicial action, the form

> "No person • • • shall be compelled in any criminal case to be a witness against himself • • •"

bespeaks restraint upon the judiciary; the words "case" and "witness" are the language of judicial proceedings. Our political ancestors were much closer in time than we to the "oath *ex officio*", to the Court of High Commission and to proceedings *In Camera Stellata*—all judicial in character, and their language reflects their revulsion.

It is respectfully urged upon the Court that while peripheral applications of the self-incrimination rule—such as the inference to be drawn from the fact that a person proved guilty by evidence *aliunde* fails to take the stand in his own defense—may not constitute violations of due process, violation of the hard core of the doctrine—the actual application of compulsion to the discovery of undisclosed crime or to the discovery of the connection of an individual with a known crime, transgresses the "canons of decency and fairness"[17] which underlie the concept of due process.

New York's Grand Jury is seeking:

> "• • • to determine whether or not the crimes of conspiracy and bribery of labor officials and the crime of extortion have been committed • • •" (R. 15).

as part of

> "• • • a continuing investigation • • • to ferret out all instances of organized racketeering in connection with labor unions" (R. 16).

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[16] *Boyd* v. *U. S.*, 116 U. S. 616.

[17] *Adamson* v. *California*, 332 U. S. 46.

This is a criminal discovery proceeding. It seeks evidence by compulsion—the compulsion of imprisonment. Its compulsion is applied to force answers to questions directed to the conduct of the witness before it. That conduct, if the questions are answered affirmatively, is criminal conduct. It immunizes him against only part of the penal consequences of disclosure, leaving the balance of crimination standing. The remaining criminal consequences, though enforceable in federal tribunals, occur under a law as domestic to New York as any law passed by its own Legislature.[18] The tribunals in which the penal consequences are enforceable are within New York and under duty to act upon disclosure. Compulsion is being applied presently and directly to force a confession of a crime, the penal results of which have not been annulled; that is abhorrent to due process.

Respondent's counsel, concluding the "due process" phase of the argument offers two makeweights. In the first, (p. 22) the argument of remoteness is admixed with the due process argument to detract from Petitioners' position on the latter. It is sufficient answer to this to say that if the case at bar is a case of actual remoteness (a point discussed *post*) that in itself is sufficient to defeat Petitioner; whereas if it is not a case of remoteness, it does not detract from Petitioner's position. Admixture of the two arguments advances neither.

The second makeweight (pp. 22-24) deals with the supposed adverse effect of a determination in favor of Petitioner upon the administration of criminal justice in the states. First observing that the prosecutors of states are

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[18] *Brownsword v. Edwards*, 2 Ves. Sen. 243, 28 Eng. Rep. 157 "The general rule is that no one is bound to answer so as to subject himself to punishment, whether that punishment arises by the ecclesiastical 'law of the land' or by common law or statute" At the time, 1750, the ecclesiastical courts were separate.

no worse off within the divided sovereignty that we enjoy than would be their counterparts within a monolithic sovereignty,[19] it is sufficient answer to say that Congress holds the key. Power to grant complete immunity exists, but it, along with many other powers has two depositories; the answer lies in accommodation between the depositories. As the soundest commentator on the subject puts it:[20]

> "The real cause of our departure from the true English tradition has been a strange concept of federalism that views nation and state as *rivals*. Almost all American judicial thinking seems to be couched in these terms. Australia, Canada, and India have avoided this mistake, and regard them, instead, as colleagues. It is they, not we, who seem to have heeded the warning of a great American, Alexander Hamilton, who in Number 82 of *The Federalist* insisted that 'the state governments and the national government, . . . are . . . kindred systems, . . . parts of One Whole.' Acceptance of such an approach should be helpful as we enter what should be an era of even greater intergovernmental cooperation."

2. New York's Immunity Statutes and Dual Sovereignty (pp. 12-16)

A. The Immunity Statutes (pp. 12-15)

The forepart of Respondent's point appears to be an attempt to draw Petitioner into an attack on the constitutionality of New York's immunity statutes. But Petitioner is not in any way affected in his claim here by New York's immunity laws. What he complains of is the complex of

[19] "The two together form one system of jurisprudence which constitutes the law of the land for the state . . ." *Claflin* v. *Houseman*, 93 U. S. 130, 136.

[20] J. A. C. Grant "Federalism and Self Incrimination", Part II, 5 UCLA L. Rev. 1, 25.

New York laws which, Respondents say, enables its Grand Jury to persist in its inquiry into whether he committed a federally cognizable crime to the point of disclosure under compulsion of imprisonment; the laws creating the court, vesting it with criminal jurisdiction, creating the Grand Jury, making it an appendage of the Court, granting power of subpoena and power to punish for contempt.

True, New York's immunity laws, if they were founded upon a Congressional grant of power (which they are not) would be material to this case. But, as they now stand, they neither grant the Petitioner protection against Federal prosecution nor do they rob him of any Federal right; they are simply ineffectual. Plaintiff's claim is not varied one iota by the presence or absence of these state immunity statutes. Hence they are immaterial.

B. Dual Sovereignty

Respondent's counsel has culled the phrase[21] "separate and distinct sovereignties" from *Abelman* v. *Booth*. But *Abelman* v. *Booth* is hardly the case on which to root the proposition that the judicial organs of a state may proceed without reference to rights claimed under the Federal Constitution. Therein the Wisconsin courts issued their writ of *habeas corpus* on behalf of a federal prisoner convicted in a Federal Court under the fugitive slave law and discharged him from the custody of the marshal. When this Court sought to review, the Wisconsin Supreme Court declined to make a return to the writ of error, and this Court, permitting the United States Attorney General to furnish an *alias* record, reversed, holding distinctly and clearly that the Wisconsin courts were bound to observe rights accruing under the Constitution and laws of the United States. The holding is a holding of federal

[21] 21 How. 506.

supremacy, more forceful because the Justices composing this Court at the time seemed to lean toward the "states rights" doctrine.

The courts of the states, so far from being independent of law stemming from the Federal Constitution are bound by it completely in the exercise of their ordinary jurisdiction. In the Second Employees Liability Cases,[22] holding that Connecticut courts could not decline jurisdiction of FELA cases on the ground that the abolition of the fellow servant rule was at variance with the public policy of Connecticut, the Court, through Mr. Justice Van Devanter said:

> "The suggestion that the Act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature and should be respected accordingly in the courts of the state."

Counsel for Respondents equates federal criminal liability with "foreign" criminal liability using the terms (p. 17) "foreign prosecution", "foreign statute" "foreign jurisdiction". Apposite is the language of *Claflin* v. *Houseman*:[23]

> "The laws of the United States are laws in the several states and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the

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[22] 223 U. S. 1.

[23] 93 U. S. 130.

several states, but is a concurrent, and, within its jurisdiction, paramount sovereignty."

The "dual sovereignty" doctrine is not only founded upon fallacy, as demonstrated in the original brief; it is also an anomaly in that it is limited to the related fields of self-incrimination and double jeopardy and appears nowhere else in the jurisprudence of federal-state relationships. Even in these fields it is applied only when the claimant of the right stands in naked and direct reliance upon the Constitution itself; when his claim is fortified by a statute, dual sovereignty is forgotten and supremacy takes its place.[24]

The object of dividing the sovereignty between the state and the Nation was to

"... secure the Blessings of Liberty...."

Here the contention is that the blessings have been lost in the division. The "dual sovereignty" doctrine should be abandoned; the law of the United States is the law of all the states.

3. Proximity of the Peril.

Counsel for Respondents assert (p. 17) that the reality of the danger in this case is no greater than the reality of the danger in *Jack* v. *Kansas*.[25] The assertion ignores the vital difference between the coverage of the anti-trust laws and the coverage of the Taft-Hartley Act. The labor act creates a unitary status; one is either an employer "in an industry affecting commerce" or he is not; and an inquiry into payments to union officials necessarily involves him if he is. On the other hand, a purveyor may restrain trade

[24] Cf. *Adams* v. *Maryland*, 347 U. S. 179.

[25] 199 U. S. 372.

intrastate without restraining interstate trade and vice versa, and an inquiry limited, as in the *Jack* case, to subjects intrastate will produce no evidence usable under the Sherman Act.

Counsel for Respondents devote some space (pp. 17-19) to examining the matter alleged in the pleadings concerning the announced policy of cooperation between the United States Attorney and the New York District Attorney to stamp out labor corruption. Petitioner's counsel deems it unnecessary to comment on the argument, but is anxious that it not serve as the vehicle to direct the Court's attention from what should be the test in such a case as this.

The test of remoteness in the matter of federal crime where inquiry is pursued in a state court is precisely the same as the test for state-created offenses. Murder, arson, theft and violation of the Taft Hartley Act are all offences against New York law, and no reason for differentiating exists. It is unthinkable that a court should weigh the relative mental acumen of Federal prosecutors as compared to State prosecutors or the diligence and efficiency of the F. B. I. as compared with that of the state police.

A point is made that the Grand Jury proceedings are secret. This has never been recognized as a ground for compelling disclosure, and the following reasons exist why it is not a sufficient answer to Petitioner:

1. The Grand Jury findings, published in the form of indictment or information, would supply sufficient information to start a Federal investigation.

2. The questions in this case are already on the record.

3. If Petitioner answered, he would waive the privilege and could be compelled to answer in public in the resulting trial.

Conclusion.

The order under review should be reversed and the cause remanded for vacatur of the mandate of commitment.

Dated: New York, March 4, 1958.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1956

No. [redacted] 189

MILTON KNAPP,

Appellant,

against

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions and FRANK S. HOGAN, District Attorney of the County of New York,

Appellees.

MOTION TO DISMISS OR AFFIRM

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INDEX

Table of Cases Cited

Statutes Cited

Other Authorities

Supreme Court of the United States

October Term, 1956

No. 1085

MILTON KNAPP,

Appellant,

against

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions and FRANK S. HOGAN, District Attorney of the County of New York,

Appellees.

MOTION TO DISMISS OR AFFIRM

May It Please the Court:

Now come the appellees in the above entitled cause and move the appeal be dismissed, or, in the alternative, that the final judgment appealed from be affirmed.

Statement

This is an appeal from a final order of the New York Court of Appeals unanimously affirming, without opinion, an order of the Appellate Division of the Supreme Court, First Department, which affirmed, with opinion, per

BERGAN, J. [2 App. Div. (2d) 579], an order of a Special Term of the Supreme Court of New York County (MARKOWITZ, J.) entered July 3, 1956, which denied and dismissed the petition of the appellant under Article 78 of the New York Civil Practice Act to review a judgment of the Court of General Sessions, New York County (SCHWEITZER, J.) rendered May 22, 1956, adjudging him in Contempt of Court (Judiciary Law, §§750, 751) and sentencing him to thirty days imprisonment in the civil jail and to pay a fine of two hundred and fifty dollars.

The Facts

On April 23, 1956, Milton Knapp, the appellant herein, was called as a witness before the April 1956 New York County Grand Jury, which was then investigating possible violations of Sections 380, 580, and 850 of the New York Penal Law (Bribery of Labor Representatives, Conspiracy and Extortion respectively). Under the provisions of Section 2447 of the Penal Law, he was granted complete immunity from prosecution concerning any crimes about which he might testify, following his refusal to answer certain questions on the grounds that the answers might tend to incriminate him. On April 25, he returned and again refused to answer questions dealing with his relationship, as an employer, with a certain named union official, and certain financial transactions between them. He persisted in his refusal, although directed to answer by the foreman, reminded of the immunity conferred upon him, advised of his possible liability for contempt, and given an opportunity to confer with his lawyer outside the jury room. The appellant was then directed to appear before the Court of General Sessions, New York County, where Honorable MITCHELL D. SCHWEITZER, an appellee

herein, after being advised as to the occurrences in the Grand Jury, ruled the questions proper and directed the appellant to answer them. When, on his next appearance before the Grand Jury, the appellant again declined on the same grounds, he was again brought before Judge SCHWEITZER in General Sessions. After one adjournment, on April 30, the District Attorney requested that the appellant be adjudged in Contempt of Court. After oral argument, the submission of briefs by both sides, and several adjournments, the appellant expressed his continuing refusal to comply with the direct order of the court to answer, and, on May 22, 1956, he was adjudged in Contempt of Court and sentenced to serve 30 days in jail and to pay a fine of two hundred and fifty dollars. (See Jurisd. Statement, Appendix A, pp. 23-33, opinion per SCHWEITZER, J.)

Thereupon, on May 23, 1956, the appellant petitioned the New York Supreme Court pursuant to Article 78 of the New York Civil Practice Act to review the contempt adjudication and to restrain the appellees herein from taking any action on the matter. He asserted, among other grounds for his petition, a lack of jurisdiction of the Court of General Sessions by virtue of alleged federal preemption of the field dealing with bribery of labor representatives, and inadequacy of the immunity granted to protect him from possible federal prosecution under the Taft-Hartley law. Other grounds, no longer at issue, were also asserted.

After hearing oral argument, and considering briefs, papers and memoranda submitted, the Supreme Court (MARKOWITZ, J.) dismissed and denied the appellant's petition in all respects (see Jurisd. Statement, Appendix A, p. 34).

The Appellate Division unanimously affirmed the denial and dismissal of the petition under Article 78 of the Civil Practice Act. Its opinion, by BERGAN, J. [2 A. D. (2d) 579; see Jurisd. Statement, Appendix A, pp. 35-43], discussed only the question of the sufficiency of the immunity. In holding the immunity granted by the grand jury sufficient, the court, assuming the fact of cooperation between the federal and state prosecuting attorneys, found that the federal courts would, in such a case, afford the appellant adequate safeguards against a federal prosecution based upon the testimony compelled by the state.

The New York Court of Appeals affirmed unanimously, without opinion [2 N. Y. (2d) 913], later amending its remittitur to state that the two federal questions here involved had been presented and passed upon [2 N. Y. (2d) 975; see Jurisd. Statement, Appendix A, pp. 43-44].

I

There is no substantial question presented.

A. Concerning the appellant's claim that the immunity granted him was insufficient

The immunity granted the appellant by the New York County Grand Jury (Penal Law §2447) was the maximum which could be granted by the State of New York. Such immunity has been held to be sufficient to displace the privilege against self-incrimination [N. Y. Const., Art. I, §6; *People* v. *Breslin* (1954) 306 N. Y. 294].

The grand jury was not required, nor could it, grant the appellant immunity from federal prosecution. The federal and New York decisions are in complete accord on the proposition that all that is necessary, to remove from a

witness the privilege against self-incrimination, is a grant of full immunity within the particular jurisdiction questioning him [*Jack* v. *Kansas* (1905) 199 U. S. 372; *Hale* v. *Henkel* (1906) 201 U. S. 43, 68-69; *United States* v. *Murdock* (1931) 284 U. S. 141, 149, (1933) 290 U. S. 389, 396; *Feldman* v. *United States* (1944) 322 U. S. 487, 490-494; *United States* v. *St. Pierre* (CCA 2d 1942) 128 F. 2d 979, 980; *Dunham* v. *Ottinger* (1926) 243 N. Y. 423, 438; *Matter of Greenleaf* (Gen. Sess. N. Y. Co. 1941) 176 Misc. 566, 569, determination confirmed 266 App. Div. 658, aff'd 291 N. Y. 690; *Matter of Herlands* (*Carchietta*) (Sup. Ct. Richmond Co. 1953) 204 Misc. 373].

Although, in the State courts, the appellant asserted that this rule did not apply to him because there existed a real and substantial danger that he might be prosecuted in the federal courts for violation of the Taft-Hartley Act [§302(a); 29 U. S. Code §186]—because of an alleged announced policy of cooperation in labor racketeering matters between the United States Attorney for the Southern District of New York and the appellee District Attorney (see Jurisd. Statement, p. 10)—he has apparently abandoned this aspect of his argument in favor of his main contention that the immunity granted by New York in the case at bar would never be sufficient to satisfy his privilege against self-incrimination.

Not only does the appellant assert that, in his case, the New York privilege against self-incrimination requires protection against possible federal prosecution, but he also claims that the Fifth Amendment is applicable (Jurisd. Statement, pp. 18-22). In support of the latter contention, the appellant finds that he has a "privilege and an immunity", enforceable under the Fourteenth Amendment,

not to testify "because the prosecuting arm of the federal government might be bestirred by the revelations made in the course of the inquisition" (*id.*, p. 20).

It is a sufficient answer to these contentions to note that this Court has held that the privilege against self-incrimination embodied in the Fifth Amendment is neither an element of due process nor a privilege or immunity of national citizenship [*Adamson* v. *California* (1947) 332 U. S. 46, 49-53; *Twining* v. *New Jersey* (1908) 211 U. S. 78, 97-99, 110]. Indeed, it would not violate the Constitution for a state to abolish the privilege entirely [see *Adamson* v. *California*, *supra*, 332 U. S. 52; *People* v. *Defore* (1926) 242 N. Y. 13, 28].

Turning to the scope of the privilege in New York, it is apparent that the allegation of possible incrimination in a foreign jurisdiction is insufficient, of itself, to bar the use of testimony in New York courts [*Woolson Spice Co.* v. *Columbia Trust Co.* (1st Dept. 1920) 193 App. Div. 346]. Nor are the New York immunity statutes invalid because they cannot protect against federal prosecution [*Dunham* v. *Ottinger*, *supra*, 243 N. Y. 436].

As this Court has observed (*Feldman* v. *United States*, *supra*, 322 U. S. at 493):

> "Whether testimony in a New York court should be compelled in exchange for immunity from prosecution under the penal laws of New York is for New York to say. For what purposes the United States may deem the disclosure of testimony more important than prosecution for federal crimes is for Congress to say. It has seen fit to make the exchange very sparingly * * * The immunity from prosecution, like the privilege against testifying which it supplants, pertains to a prosecution in the same jurisdiction."

This Court went on to say in the *Feldman* case, *supra* (322 U. S. at 493-494):

> "The cautionary words in *Jack* v. *Kansas* in nowise qualified the principle of that and later cases as to the separateness in the operation of state and federal criminal laws and state and federal immunity provisions."

Moreover, in the instant case, the appellant would not have been unprotected if he had testified in the grand jury. Under Section 952-t of the New York Criminal Code, the disclosure of grand jury testimony is prohibited except upon court order. This section, taken in conjunction with Section 2447 of the New York Penal Law and Article I, Section 6, of the New York Constitution, would appear to preclude the possibility that the appellant's grand jury testimony could be subsequently used as the basis for a federal prosecution under the Taft-Hartley Act [see, also, *United States* v. *DiCarlo* (D. C. N. D. Ohio 1952) 102 F. Supp. 604].

In this connection, it must be emphasized that Section 2447 of the New York Penal Law specifically provides that, in addition to granting a witness immunity from prosecution for any crime disclosed, incriminating testimony compelled shall not be received against him "upon *any* criminal proceeding."

Furthermore, as the Appellate Division pointed out in its opinion [2 A. D. (2d) 579, 585; see 426], if cooperation between the state and federal authorities were found to have existed, a federal court would forbid the use of the appellant's testimony in any federal prosecution (*Feldman* v. *United States*, *supra*, 322 U. S. 487, 494).

The immunity granted was clearly sufficient to protect the appellant, and, accordingly, no substantial federal issue exists for review.

B. Concerning the appellant's claim that federal legislation has pre-empted the field

As an alternative justification for his refusal to answer the grand jury questions, the appellant asserts that New York is powerless to enforce Section 380 of the Penal Law because it conflicts with, and is superseded by, Section 302 of the Taft-Hartley Act (29 U. S. Code §186). Consequently, he argues, the Court of General Sessions was without jurisdiction and could not require him to answer questions relative to possible violations of said Section 380.

Section 380 of the Penal Law, entitled "Bribery of Labor Representatives," as it existed at the time of the instant adjudication of contempt, provided, in part:

> "1. A person who gives or offers to give any money, property or other thing of value to any duly appointed representative of a labor organization with the intent to influence him in respect to any of his acts, decisions, or other duties as such representative, or to induce him to prevent or cause a strike by the employees of any person or corporation, is guilty of a misdemeanor.
>
> "2. Any duly appointed representative of a labor organization who solicits or accepts or agrees to accept from any person any money, property or other thing of value upon any agreement or understanding, express or implied, that he shall be influenced in respect to any of his acts, decisions, or other duties as such representative, or upon any agreement or understanding, express or im-

plied, that he shall refrain from causing or shall prevent a strike or work stoppage or any form of injury to any business, is guilty of a misdemeanor."

Section 302 of the Taft-Hartley Act (29 U. S. Code §186) provides, in part:

"(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value."

Subdivision (c) exempts certain types of payments, not here relevant, while subdivision (d) makes a violation of the section a misdemeanor, and subdivision (e) empowers Federal District Courts to restrain violations thereof.

This section has been interpreted by this Court as outlawing all payments whatsoever, with the stated exceptions, between employer and representative [*United States* v. *Ryan* (1956) 350 U. S. 299, 305].

Of course, the mere fact that the same act is subject to both state and federal penalties, does not mean that the state law must, *ipso facto*, be deemed invalid [*California* v. *Zook* (1949) 336 U. S. 725, 731, and cases there cited]. Especially when the state enactment involves an exercise of its "usual police powers," courts should be hesitant, in the absence of an express manifestation of

congressional purpose, to find it displaced by federal legislation [*Kelly* v. *Washington* (1937) 302 U. S. 1, 10-11; *California* v. *Zook, supra,* 336 U. S. 734]. It cannot be doubted that the subject of bribery is one which has traditionally been regulated by the criminal laws of the states.

Congress never specifically manifested an intent to have Section 302 (a) of the Taft-Hartley Act provide the exclusive means of penalizing bribery of labor representatives of unions subject to the Act. Nor is this a case, such as sedition or control of aliens, where the federal interest is so overwhelming as, inferentially, to preclude any state regulation [*e.g., Pennsylvania* v. *Nelson* (1956) 350 U. S. 497; *Hines* v. *Davidowitz* (1941) 312 U. S. 52].

It is difficult to believe that Congress, in enacting the Taft Hartley Act, which increased the legal responsibility of unions [see *United Construction Workers* v. *Laburnum Construction Corp.* (1954) 347 U. S. 656, 666], intended to free union officials from accountability to the states for violations of their existing criminal laws, merely because such conduct was now also a violation of that Act. That such was never intended, can be seen from the Senate Report (No. 105, 80th Cong., 1st Sess. 50) preceding the adoption of the Act, and from a statement of Senator Taft, both quoted in the *Laburnum* case (347 U. S., at pp. 668-669). Referring to the possibility that a threat of violence, which would be a crime under state law, might also be an unfair labor practice, the Senator said:

> "There is no reason in the world why there should not be two remedies for an act of that kind." (93 Cong. Rec. 4024.)

The New York statute is not directed at the "methodology" or "motivation" of strikes (see Jurisd. Statement,

p. 15). Rather, its main purpose is to insure that labor representatives, in the performance of all their duties, remain faithful to their membership [see *People* v. *Cilento* (1956) 2 N. Y. (2d) 55, 62].

Although Congress may have had company domination of unions in mind in enacting parts of the Taft-Hartley Act (see Jurisd. Statement, pp. 11-12), there can be little doubt that the provisions here involved were at least partially aimed at labor racketeering. As one court stated:

> "An apparent purpose of Section 186(a), (b) and (d) • • • is to preserve the integrity of the labor-management relationship by prohibiting bribery, extortion or any form of dishonesty as between employer and employees."
>
> [*United States* v. *Brennan* (D. C. Minn. 1955) 134 F. Supp. 42, at p. 47; see also *William Dunbar Co.* v. *Painters & Glaziers Dist. Council* (D. C. D. C. 1955) 129 F. Supp. 417, 424].

It would seem, therefore, that the purposes of the New York and federal statutes are similar. Section 380 of the Penal Law, if anything, aids in the enforcement of these provisions of the Taft-Hartley Act [see *Gilbert* v. *Minnesota* (1920) 254 U. S. 325, 331].

The appellant fails to show any conflict of substance between the two statutes. Essentially, his entire argument on this point rests upon the premise that "coincidence means invalidity," the absurdity of which has been well illustrated by this Court (see *California* v. *Zook*, *supra*, 336 U. S. 732).

As in the case of extortion and robbery under the Federal Anti-Racketeering Act [18 U. S. Code §1951; see

United States v. *Local 807, etc.* (1942) 315 U. S. 521, 536], the subject of bribery of labor representatives is one open to concurrent regulation by the states. Consequently, Section 380 of the Penal Law is unaffected by Section 302 of the Taft-Hartley Act.

Finally, it should be noted that the grand jury was investigating, as well as bribery of labor representatives, the possible existence of the crimes of extortion and conspiracy (78); hence the Court of General Sessions had jurisdiction irrespective of the validity of Section 380.

Conclusion

The appellant's contentions are insubstantial and foreclosed by previous decisions of the Court. The appeal should therefore be dismissed, or in the alternative the judgment appealed from should be affirmed.

Respectfully submitted,

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July 17, 1957

Supreme Court of the United States

October Term, 1957

No. 189

MILTON KNAPP,

Petitioner,

against.

MITCHELL D. SCHWEITZER, Judge of the Court of General Sessions, and FRANK S. HOGAN, District Attorney of the County of New York,

Respondents.

RESPONDENTS' BRIEF

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INDEX

Table of Cases Cited

Statutes Cited

Other Authorities

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Statement

This case is before the Court on a writ of *certiorari* to the New York Court of Appeals granted on October 14, 1957 (355 U. S. 804; R. 104-5), to review a final order of that Court unanimously affirming, without opinion [2 N. Y. (2d) 913; 975], an order of the Appellate Division of the Supreme Court, First Department, which affirmed, with opinion [2 App. Div. (2d) 579], an order of a Special Term of the New York Supreme Court, New York County, entered July 3, 1956, which denied and dismissed the petitioner's application under Article 78 of the New York

Civil Practice Act to review a judgment of the Court of General Sessions, New York County (SCHWEITZER, J.), rendered May 22, 1956, adjudging the petitioner in contempt of court (Judiciary Law, §§750, 751) and sentencing him to thirty days imprisonment in the civil jail and to pay a fine of two hundred and fifty dollars.

Statutes Involved

In addition to those provisions of federal law and the Constitution of the United States set forth in petitioner's brief (pp. 4-5), the following statutes of the New York State Penal Law are herein involved:

"§380. Bribery of labor representatives

1. A person who gives or offers to give any money, property or other thing of value to any duly appointed representative of a labor organization with the intent to influence him in respect to any of his acts, decisions, or other duties as such representative, or to induce him to prevent or cause a strike by the employees of any person or corporation, is guilty of a misdemeanor.

2. Any duly appointed representative of a labor organization who solicits or accepts or agrees to accept from any person any money, property or other thing of value upon any agreement or understanding express or implied, that he shall be influenced in respect to any of his acts, decisions, or other duties as such representative, or upon any agreement or understanding, express or implied, that he shall refrain from causing or shall prevent a strike or work stoppage or any form of injury to any business, is guilty of a misdemeanor.

3. In any criminal proceeding before any court, magistrate or grand jury, for a violation of this section, the court, magistrate or grand jury may confer

immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

"§381. Offender a competent witness; witnesses' immunity

• • •

2. In any criminal proceeding before any court, magistrate or grand jury, or upon any investigation before any joint legislative committee, for or relating to a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, the court, magistrate or grand jury, or the committee may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

"§580. Definition and punishment of conspiracy

If two or more persons conspire:

1. To commit a crime; or,

2. Falsely and maliciously to indict another for a crime, or to procure another to be complained of or arrested for a crime; or,

3. Falsely to institute or maintain an action or special proceeding; or,

4. To cheat and defraud another out of property, by any means which are in themselves criminal, or which, if executed, would amount to a cheat, or to obtain money or any other property by false pretenses; or,

5. To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property be-

longing to or used by another, or with the use or employment thereof; or,

6. To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice, or of the due administration of the laws,

Each of them is guilty of a misdemeanor."

"§584. Witnesses' immunity

In any criminal proceeding before any court, magistrate, or grand jury, or upon any investigation before any joint legislative committee for or relating to a violation of any of the provisions of this article, the court, magistrate or grand jury, or the committee, may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

"§850. Extortion defined

Extortion is the obtaining of property from another, or the obtaining the property of a corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear, or under color of official right."

"§2447. Witnesses' immunity

1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with

the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

3. 'Competent authority' as used in this section means:

(a) The court or magistrate before whom a person is called to answer questions or produce evidence in a criminal proceeding other than a proceeding before a grand jury, when such court or magistrate is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(b) The court before whom a person is called to answer questions or produce evidence in a civil proceeding to which the state or a political subdivision thereof, or a department or agency of the state or of such political subdivision, or an officer of any of them in his official capacity, is a party, when such court is expressly requested by the attorney-general of the state of New York to order such person to give answer or produce evidence; or

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(d) A legislative committee or temporary state commission before which a person is called to answer questions or produce evidence in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein; provided that a majority of the full membership of such committee or commission concur therein; or

(e) The head of a state department or other state agency, a commissioner, deputy or other officer before whom a person is called to answer questions in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein.

Provided, however, that no such authority shall be deemed a competent authority within the meaning of this section unless expressly authorized by statute to confer immunity.

4. Immunity shall not be conferred upon any person except in accordance with the provisions of this section.

5. If, after compliance with the provisions of this section, or any other similar provision of law, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate district attorney having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him. Added L. 1953, c. 891, §1, eff. Sept. 1, 1953."

The Facts and the Proceedings Below

On April 23, 1956, Milton Knapp, the petitioner herein, was called as a witness before the April 1956 New York County Grand Jury, which was then investigating possible violations of sections 380, 580, and 850 of the New York Penal Law (Bribery of Labor Representatives, Conspiracy and Extortion, respectively) (R. 81). Following his refusal to answer a certain question on the ground that the answer might tend to incriminate him (*ibid.*), the petitioner was directed to answer and was offered complete immunity from prosecution on account of any matters which might thereby be disclosed, pursuant to the provisions of section 2447 of the New York Penal Law (*ibid.*; pp. 4-6, *supra*).

On April 25, the petitioner returned and again refused to answer questions dealing with his relationship, as an employer, with certain named union officials, and probing certain financial transactions between them (R. 15, 17-23). He persisted in his refusal, although directed to answer by the foreman, reminded of the immunity offered him, advised of his possible liability for contempt, and given an opportunity to confer with his lawyer outside the grand jury room (*id.*). The petitioner was then directed to appear before the Court of General Sessions, New York County, where Honorable Mitchell D. Schweitzer, a respondent herein, after a hearing, ruled the questions proper and directed the petitioner to answer them (R. 33). On his next appearance before the grand jury, the petitioner again declined to answer on the same grounds (37-41).

He was once more brought before Judge SCHWEITZER in General Sessions on April 30, at which time the Dis-

trict Attorney requested that the petitioner be adjudged in contempt of court (R. 36). After oral argument, the submission of briefs by both sides, and several more adjournments, the petitioner expressed his continuing refusal to comply with the direct order of the court to answer, and, on May 22, 1956, he was adjudged in contempt of court and sentenced to serve 30 days in jail and to pay a fine of two hundred and fifty dollars (R. 41, 76, 81-90).

Thereupon, on May 22, 1956, the petitioner applied to the New York Supreme Court, pursuant to Article 78 of the New York Civil Practice Act, to review the contempt adjudication, and to restrain the respondents herein from taking any action on the matter (R. 3-6). His petition asserted, among other grounds, inadequacy of the immunity offered as protection from possible federal prosecution under the Taft-Hartley law (R. 5).

Other grounds alleged are no longer at issue.

After hearing oral argument, and considering briefs, papers and memoranda submitted, the Supreme Court dismissed and denied the petition in all respects (R. 1-2, 91).

The Appellate Division unanimously affirmed the order of the Supreme Court (R. 91-2). In its opinion [2 A. D. (2d) 579; R. 93-100], the Court held that the immunity offered by the grand jury was sufficient protection for the petitioner and he was, therefore, required to testify.

The New York Court of Appeals affirmed unanimously, without opinion [2 N. Y. (2d) 913; R. 101-2], later amending its remittitur to state that the federal question here involved had been presented and passed upon [2 N. Y. (2d) 975; R. 102-4].

Summary of Argument

The respondents' attempt to compel the petitioner to testify before a New York grand jury, pursuant to a statute offering him immunity from prosecution on account of his testimony, contravened no right or prohibition enunciated in the United States Constitution.

Even were the Fifth Amendment of the Federal Constitution, embodying the privilege against self-incrimination, applicable to and binding upon the states, the action of the New York officials in the instant case did not amount to any abridgement of that privilege. Under the provisions of New York State law, the petitioner was offered full immunity from prosecution in New York and insulation against future use in New York of the evidence thus obtained.

Such protection constitutes full and complete compensation for compelling a witness to testify against himself, notwithstanding the remote and unsubstantial possibility that a prosecution may occur in some other jurisdiction on account of, or making use of, the testimony thus elicited.

This well settled rule, derived from English common law, has been repeatedly applied by this Court in those cases where incriminating testimony is obtained under similar immunity provisions of the federal government, which operates squarely under the restrictions of the Fifth Amendment.

Although there may be cases in which real and impending cross-jurisdictional danger might be shown, no such

situation here obtains. In the instant case, there is no valid demonstration that the petitioner's peril is any more substantial or immediate than in the ordinary or typical case where a federal crime exists in the field concerning which a witness testifies. An alleged "policy of cooperation" between federal and state prosecutors, upon which the petitioner relies, is vague and, realistically speaking, wholly illusory. Moreover, if an active conspiracy actually did exist between the New York and federal jurisdictions, the evidence so obtained against the witness, this Court has declared, would be inadmissible in a federal court.

The foregoing discussion has proceeded upon the assumption that the Fifth Amendment controls the states as well as the federal Government. This assumption is, of course, contrary to the unbroken line of decisions of this Court. That the Amendment itself restricts only the federal government can hardly be challenged, and this Court has consistently rejected the contention that the Bill of Rights was incorporated by reference in the Fourteenth Amendment and thereby made applicable to the states.

Neither the "privileges and immunities" clause nor the "due process" clause of the Fourteenth Amendment is automatically offended by a state which fails to observe one or another of the specific provisions of the Bill of Rights. Rather, this Court has employed the Fourteenth Amendment, and particularly the "due process" clause thereof, to invalidate only such state action as infringes those basic and fundamental principles constituting the essence of ordered liberty. Specifically, the privilege against self-incrimination has been repeatedly examined and found to be without the orbit of the Fourteenth Amendment. Indeed, it has been held that a state could abolish the privi-

lege altogether without transgressing upon the constitutional concept of due process of law.

Even in the view most favorable to the petitioner's argument, the instant case does not present anything comparable to a total abrogation of the privilege principle. New York, fully respecting the privilege, has compensated the witness for his testimony with the strongest shield against subsequent prosecution which it can forge. Thus, completely protected in New York, the witness faces only the bare possibility of jeopardy in some other jurisdiction.

To hold, under the circumstances of the instant case, that New York denied the petitioner due process of law within the meaning of the Fourteenth Amendment would be wholly inconsistent with the entire line of decisions of this Court and would amount to a perversion of the concept of justice which has traditionally governed the construction of the Amendment.

Moreover, to strike down as unconstitutional the interrogation of the petitioner in the instant case, would be to emasculate the vital immunity statutes of every state in the Union. In effect, the states would be rendered powerless to conduct investigations and prosecutions in those areas of particularly pernicious criminal activity where virtually all important evidence rests in tainted hands. The resultant harm to orderly criminal law enforcement would be incalculable.

Argument

Adjudged in contempt for refusing to answer questions before a New York grand jury as to whether he had made payments to labor union representatives—a criminal act under the laws of New York[1]—the petitioner justifies his refusal on the ground that his federal constitutional rights under the Fifth Amendment, and perhaps under the Fourteenth,[2] were violated by an attempt to compel testimony from him pursuant to a statute immunizing him from prosecution in New York for or on account of any matter revealed by such prospective testimony.[3]

In effect, the petitioner's contention challenges the New York immunity provision as not according protection from criminal prosecution as broad as the self-incrimination privilege destroyed because, though fully insulating a witness from the use of compelled testimony against him in any criminal proceeding in New York tribunals, and from any New York prosecution with respect to the subject matter thereof, it does not similarly protect him from possible testimonial detriment in the federal courts.[4]

The possibility of future federal prosecution exists in this case, it is urged, because bribery of labor union representatives—the subject of the grand jury inquiry herein—

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[1] N. Y. Penal Law, §380, pp. 2-3, *supra*.

[2] See petitioner's brief, pp. 12, 21, 22.

[3] N. Y. Penal Law, §§381, 2447, pp. 3, 4-6, *supra*.

[4] While never explicitly stated, this argument, essential to the petitioner's cause, is implicit in his numerous references to the anticipated danger of federal prosecution (see petitioner's brief, *passim*).

constitutes a crime under the Taft-Hartley Act[5] as well as under the New York Penal Law. And this possiblity becomes a realistic danger, the petitioner contends, by virtue of an announced general policy of cooperation in labor racketeering matters between the United States Attorney for the Southern District of New York and the District Attorney of New York County.[6]

We demonstrate below, first, that even were this case controlled by the Fifth Amendment of the federal Constitution, there is nothing in the situation at bar which abridged the petitioner's privilege against self-incrimination. Secondly, we show that, even could the present operation of the New York immunity statute in question be deemed violative of the privilege as enunciated in the Fifth Amendment, there would be no constitutional infringement of either the Fifth Amendment or the Fourteenth, since (a) the Fifth is not applicable to or binding upon the states, and (b) the Fourteenth does not encompass matters of the sort at hand.

A. Even assuming the applicability of the Fifth Amendment to the states, no violation of the privilege principle contained therein occurred.

In framing its immunity statutes, a state offers a witness, in return for its withdrawal of the privilege against

[5] Labor-Management Relations Act, §302; 29 U. S. C. §186; 61 Stat. 157.

[6] See petitioner's brief, pp. 11-12. Although the source of the alleged policy of cooperation is nowhere specified, it is presumed that the petitioner refers to a statement by Hon. Paul W. Williams, U. S. Attorney for the Southern District of New York, reported in the press, announcing a general policy of cooperation in the prosecution of "racketeers." See, *e.g.*, New York Times, March 14, 1956, p. 1, col. 1.

self-incrimination, all the immunity and protection it can, which of necessity is confined to exemption of the witness from prosecution in its own courts and from the use of compelled evidence therein.[7] Neither New York nor any other state possesses the power to grant immunity from prosecution in a federal court or protection from the use of compelled evidence in a federal court.[8]

In enacting immunity provisions for the federal jurisdiction, of course, the Congress may, by virtue of the federal supremacy clause,[9] forbid any use of the federally compelled evidence not only in the federal criminal courts but in the state courts as well.[10]

In each of two cases arising near the turn of the century, *Brown* v. *Walker*[11] and *Hale* v. *Henkel*,[12] the contention was advanced that certain federal immunity provisions violated the privilege against self-incrimination as embodied in the Fifth Amendment, because they failed to preclude the use in state courts of evidence federally compelled thereunder. In the *Brown* case, this Court construed the particular provision otherwise, holding that its protection did extend to

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[7] *Jack* v. *Kansas*, 199 U. S. 372; *Feldman* v. *United States*, 322 U. S. 487.

[8] *Jack* v. *Kansas* (*supra*, n. 7) at p. 380; *Dunham* v. *Ottinger*, 243 N. Y. 423.

[9] United States Constitution, Art. 6, cl. 2.

[10] *Brown* v. *Walker*, 161 U. S. 591, 606-607; *Adams* v. *Maryland*, 347 U. S. 179; *cf. United States* v. *Saline Bank*, 1 Pet. 100.

[11] 161 U. S. 591.

[12] 201 U. S. 43.

state proceedings.[13] In each case, however, the Court held that, even assuming the exemption to be limited as claimed, the Fifth Amendment was not violated because of the possibility of a state thereafter using the evidence obtained against the federal witness.[14]

At about the same time, in the case of *Jack* v. *Kansas*,[15] a similar contention was made in the reverse situation, namely, with respect to a state immunity provision which did not, as it could not, prevent the use in federal courts of state compelled evidence. While the Fifth Amendment itself was not applicable in that case, this Court held, on the reasoning of *Brown* v. *Walker*, that, in any event, a state immunity provision is not constitutionally defective because it does not extend protection beyond its own jurisdiction.[16]

These conclusions are partially based upon the historic principle that the state and federal governments operate as "separate and distinct sovereignties";[17] that, generally speaking, each acts independently within its particular sphere; and, hence, that the validity of an immunity statute and the sufficiency of the exemption accorded are to be judged from the standpoint of whether the statute extends complete protection within the legislating

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[13] 161 U. S. 591, 607-608.

[14] 161 U. S. 591, 608; 201 U. S. 43, 68-69.

[15] 199 U. S. 372.

[16] See also *United States* v. *Murdock*, 284 U. S. 141; *United States* v. *St. Pierre* (C. C. A. 2d) 128 F. (2d) 979.

[17] *Abelman* v. *Booth*, 21 How. 506, 516; *Ponzi* v. *Fessenden*, 258 U. S. 254, 261.

jurisdiction itself.[18] The general rule evolving from this doctrine is succinctly stated in *United States* v. *Murdock*:[19]

> "The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."

It may be true that, where a federal crime exists covering the subject matter of a state examination of a witness, a subsequent federal prosecution of the witness is possible, and that, in that event, the state compelled evidence might conceivably be used to his detriment. This possibility, it is to be noted, results not alone from the existence of the state immunity provisions, which are designed merely to produce evidence for the state's own use, but from decisions of this Court rendering such evidence admissible in the federal courts.[20]

The decisions have evaluated this possibility of federal evidentiary use in making the determination of whether a jurisdictionally limited state immunity offer in any way offends the federal Constitution. The conclusion reached by this Court in the leading cases is that, ordinarily, the bare possibility of federal use is so unsubstantial and remote that no immunity deficiency and, hence, no violation of the self-incrimination privilege can be predicated.[21]

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[18] *Hale* v. *Henkel*, 201 U. S. 43, 69; *Feldman* v. *United States*, 322 U. S. 487. This doctrine follows the English common law rule set forth in *King of the Two Sicilies* v. *Willcox*, 7 State Trials (N. S.) 1049, 1068.

[19] 284 U. S. 141, 149.

[20] *Feldman* v. *United States*, 322 U. S. 487; see also *Jack* v. *Kansas*, 199 U. S. 372, 380.

[21] *Brown* v. *Walker*, 161 U. S. 591; *Hale* v. *Henkel*, 201 U. S. 43. See, also, *Queen* v. *Boyes*, 1 B. & S. Q.B. 311, 330-331.

In effect, these decisions establish a presumption of remoteness in the average or typical case: a case where the principal factor suggesting a possibility of foreign prosecution is merely the existence of a foreign statute rendering the activities under investigation criminal in the particular foreign jurisdiction. Such was the situation in *Jack* v. *Kansas*,[22] for example, where the claim of substantial danger rested almost entirely upon the circumstance that a Kansas anti-trust proceeding might, through the employment of a Kansas immunity provision, produce evidence from a witness enmeshing him in federal anti-trust violations. And it is to be observed in this connection that the existence of federal bribery provisions covering the subject matter of the state inquiry in the present case no more creates a real and substantial danger of federal prosecution here than did the existence of the federal anti-trust laws at the time of the state anti-trust proceeding involved in *Jack* v. *Kansas*.

It is conceivable that a case of substantial danger might arise by virtue of certain extraordinary circumstances, such as the pendency or actual commencement of a foreign criminal proceeding against a person, based upon the very matters about which a grand jury or other agency is contemporaneously interrogating him.[23]

Here, however, nothing of that nature appears, and there is no feature of this case which distinguishes it from the typical situation exemplified by *Jack* v. *Kansas*. Nor is this conclusion affected by the petitioner's reference to a so-called announced policy of cooperation between

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[22] 199 U. S. 372.

[23] See, *e.g.*, *Ballman* v. *Fagin*, 200 U. S. 186; *United States* v. *Di Carlo* (D.C., N.D. Ohio E. D.) 102 F. Supp. 597.

the federal and local prosecutors with respect to labor racketeering.[24]

This asserted "policy" appears vague and general at best. There is no indication whatever of any federal proceeding pending against this petitioner, under the Taft-Hartley Law or otherwise, nor of any intention on the part of any federal agency to initiate one. There is not the slightest suggestion of joint action with respect to the petitioner, nor, indeed, of any interest in him on the part of the United States Attorney. Even if there were, moreover, it is highly questionable whether the latter official could obtain the grand jury testimony sought, protected, as it would be, by New York statutes prohibiting disclosure thereof.[25]

It seems clear that the petitioner, unable to show any real danger of federal prosecution, has erected a phantom peril in the form of the aforementioned general "policy." The fears expressed by the petitioner on this score seem conveniently assumed, highly illusory and, indeed, purely in the nature of afterthought. As a matter of fact, the "policy" of cooperation underlying the petitioner's asserted anxiety was not even mentioned during the extensive proceedings leading up to the contempt adjudication, and no reference to it was made until the tail end of the pleadings submitted in the first court of review (R. 9).

Assuming, however, that this "policy" were construed to embrace cooperation between federal and local prosecutors

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[24] See note 6, *supra*.

[25] N. Y. Code of Criminal Procedure, §§258, 259, 952t; N. Y. Penal Law §§1782, 1783, 1784.

with respect to this specific case, the petitioner could not have been injured thereby. In that circumstance, as pointed out by a lower appellate Court herein,[26] the opinion in *Feldman* v. *United States* would preclude the use in a federal court of any New York grand jury testimony obtained from the petitioner.[27] And, on the other hand, if the "policy" in question did not affect him, he was not in any real or substantial danger within the meaning of the decisions.

However viewed, therefore, no aspect of this case violates the privilege against self-incrimination as that principle is understood in connection with the Fifth Amendment.

B. Even assuming an impairment of the privilege against self-incrimination, no violation of the Fifth or Fourteenth Amendments occurred.

Were all the foregoing to be rejected, and were we to assume, *arguendo*, that the interrogation of the appellant pursuant to the New York immunity statute constituted an infringement of his self-incrimination privilege as that privilege has been enunciated in the Fifth Amendment, the appellant's cause would be no more impressive.

In the first place, the alleged privilege impairment could not be deemed a violation of the Fifth Amendment itself, since it is axiomatic that that Amendment, as a part of the Bill of Rights, is not applicable to or controlling upon the states.[28] Any contention of constitutional depriva-

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[26] 2 App. Div. (2d) 579, 585-586.

[27] 322 U. S. 487, 494.

[28] *Barron* v. *Baltimore*, 7 Pet. 243; *Jack* v. *Kansas*, 199 U. S. 372, 379-380; *Twining* v. *New Jersey*, 211 U. S. 78, 92; *Gaines* v. *Washington*, 277 U. S. 81, 85.

tion, therefore, necessarily must be asserted under the Fourteenth Amendment.

It is also well settled that the Fourteenth does not embrace the Fifth nor any of the other first eight Amendments.[29] In short, the Bill of Rights is not deemed an enumeration of the "privileges" and "immunities" referred to in the Fourteenth Amendment,[30] nor does a state's failure to abide by the mandates of the first eight Amendments automatically amount to a lack of "due process of law."[31]

A violation of due process, this Court has repeatedly held, occurs only upon a flagrant transgression of the most basic concepts of American justice.[32] It involves inequities offending "those canons of decency and fairness which express the notions of justice of English-speaking peoples,"[33] which constitute "the very essence of a scheme of ordered liberty,"[34] and which are ranked as "fundamental"

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[29] *Slaughter-House Cases*, 16 Wall. 36; *Twining* v. *New Jersey* (*supra*, n. 28); *Adamson* v. *California*, 332 U. S. 46.

[30] *Slaughter-House Cases* (*supra*, n. 29); *Maxwell* v. *Dow*, 176 U. S. 581; *Adamson* v. *California* (*supra*, n. 29) at p. 51.

[31] *Twining* v. *New Jersey*, 211 U. S. 78; *Palko* v. *Connecticut*, 302 U. S. 319, 323; *Adamson* v. *California*, 332 U. S. 46.

[32] *Snyder* v. *Massachusetts*, 291 U. S. 97, 105; see, *e.g.*, *Palko* v. *Connecticut* (*supra*, n. 31).

We do not herein review the arguments for the well settled rule that the first eight Amendments are not embraced by the phrase "privileges or immunities" occurring in the Fourteenth Amendment [see, *e.g.*, *Maxwell* v. *Dow*, 176 U. S. 581] notwithstanding petitioner's offhand reference to the clause (brief p. 22).

[33] *Adamson* v. *California* (*supra*, n. 31) at p. 67.

[34] *Palko* v. *Connecticut* (*supra*, n. 31) at p. 325.

because they "lie at the base of all our civil and political institutions."[35]

Pursuant to this standard, many accepted safeguards familiar to American jurisprudence are not regarded as essential to due process. The right to accusation by indictment,[36] for example, the right to a jury trial,[37] and protection from double jeopardy[38] fall outside the concept of due process. So also does the privilege against self-incrimination.[39]

Such was the explicit holding of *Twining* v. *New Jersey*,[39] where it was flatly declared that the entire privilege against self-incrimination could be abolished without offense to due process. And that doctrine has been repeatedly endorsed in subsequent opinions of this Court.[40]

So far as due process is concerned, therefore, the New York provision at hand would be constitutionally valid though it offered no immunity or protection whatever, even in the New York courts, in return for the evidence which it compels. In fact, however, neither the statute nor its operation in this case entails anything comparable to a total abolition of the privilege principle, nor to a complete emasculation thereof through failure to accord any immunity in return for its abridgement.

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[35] *Hebert* v. *Louisiana*, 272 U. S. 312, 316; *Snyder* v. *Massachusetts* (*supra*, n. 32) at p. 105.

[36] *Hurtado* v. *California*, 110 U. S. 516.

[37] *Maxwell* v. *Dow*, 176 U. S. 581.

[38] *Palko* v. *Connecticut* (*supra*, n. 31).

[39] 211 U. S. 78.

[40] *Adamson* v. *California* (*supra*, n. 31); *Palko* v. *Connecticut* (*supra*, n. 31); *Snyder* v. *Massachusetts* (*supra*, n. 32).

Quite to the contrary, New York respects the privilege principle and agrees that it should never be rendered inoperative without adequate compensation.[41] In withdrawing the privilege for present purposes, as already noted, it has offered its witnesses all the protection within its power by extending them immunity from any prosecution within its jurisdictional borders which might otherwise result from the testimony compelled.

Realistically, at least, this is a very satisfactory *quid pro quo*. It leaves here only the very unlikely possibility of detriment in another jurisdiction based upon a series of highly speculative contingencies, namely, that a federal prosecution under the Taft-Hartley Law might be instituted against the petitioner grounded upon the subject matter of the grand jury inquiry at bar; that, if it were, the grand jury minutes might become available to the federal prosecutor; and that, under such circumstances, he might choose to use them.

It is these shadowy possibilities, the petitioner necessarily contends, which so shock the American conscience as to require a declaration that the due process clause has been violated. To so hold, we submit, would be to distort the traditional spirit and meaning of the Fourteenth Amendment.

The effect of such a holding, moreover, would be to cripple the administration of state criminal laws in those vital areas where immunity statutes are employed. The instant situation is but one of many where the testimony sought from a witness under an immunity provision may

[41] See New York Constitution, Art. I, §6. See also *People v. Breslin*, 306 N. Y. 294, 296-297; *Matter of Doyle*, 257 N. Y. 244, 250-251.

incidentally indicate the commission by him of a federal crime. This Court is here asked to rule that, in every such instance, the state immunity laws are impotent.

The consequent hardship would be incalculable. The purpose of immunity statutes is, of course, to obtain evidence from tainted sources which otherwise would be barricaded behind the privilege. Especially in the investigation and prosecution of racketeering and other organized crime, vital evidence is frequently found exclusively in those mouths which would remain tightly closed were it not for immunity provisions. "Indeed, in the United States, or some of them," Wigmore has observed, "it is difficult to conceive how the law could ever have succeeded in punishing certain insidious offences without thus clearing the way for justice."[42]

This, apparently, is the thought of the state legislatures throughout the nation. New York alone has enacted 48 immunity provisions, covering those areas of investigation where tainted or accomplice testimony is deemed most necessary;[43] and similar provisions exist in varying numbers in most of the other states.[44] This, perhaps, is the best indication of the value of the immunity statute method of obtaining testimony, for "the frequent and increasing resort to it seems to show how necessary it is found to be."[45]

Bearing this in mind, it is patent that the judicial approach to these immunity provisions should not take

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[42] 8 Wigmore on Evidence (3rd Ed. 1940) §2281, p. 501.

[43] See Third Report of New York State Crime Commission, New York Legislative Document (1953) No. 68, pp. 26-29.

[44] See Wigmore, *op. cit.*, §2281, n. 11, pp. 476-500.

[45] Wigmore, *op. cit.*, §2281, at p. 501.

the form of an assiduous search for technical constitutional defects; rather, the courts should attempt to construe the statutes, if at all possible, as compatible with the Fourteenth Amendment and the federal Constitution in general. That principle finds clear expression in this Court's opinion in *Brown* v. *Walker*:

> "It can only be said in general that the clause [an immunity statute] should be construed, as it was doubtless designed, to effect a practical and beneficent purpose—not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder or obstruct the administration of criminal justice. That the statute should be upheld, if it can be construed in harmony with the fundamental law, will be admitted. Instead of seeking for excuses for holding acts of the legislative power to be void by reason of their conflict with the Constitution, or with certain supposed fundamental principles of civil liberty, the effort should be to reconcile them if possible • • •."[46]

Certainly, it requires no "effort" here "to reconcile" the New York provision in issue, and its operation in this case, with the due process clause of the Fourteenth Amendment. Not only has that reconciliation been established by all the pertinent decisions on the subject, but the unsalutary contrary result could be reached only by a reasoning process both strained and oblivious to realities.

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[46] 161 U. S. 591, 596.

Conclusion

The order of the court below should be affirmed.

Respectfully submitted,

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